No. 3543

United States
Circuit Court of Appeals
For the Ninth Circuit

J. A. CZIZEK, *Plaintiff in Error,*

vs.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division

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SYMS-YORK CO., PRINTERS & BINDERS, BOISE

*No.*_____

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DEFENDANT'S EXHIBITS

(*) Original forwarded.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

RICHARD H. JOHNSON,
Boise, Idaho.
Attorney for Plaintiff in Error.

RICHARDS & HAGA,
Boise, Idaho.
Attorneys for Defendant in Error.

In the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada

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J. A. CZIZEK, Plaintiff,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Defendant.

COMPLAINT

The above named plaintiff, complaining of the above named defendant, avers:

I

That the defendant is, and at the several times hereinafter mentioned was, a corporation duly organized under and by virtue of the Laws of the State of New York, and is now, and was at all such times, engaged in the business of a common carrier of messages by telegraph, for hire, and owned and operated wire connections between the cities of Boise, Idaho, and Oakland, California, and was engaged in transmitting telegraph messages for hire between said cities.

II

That on the 30th day of November, 1917, and for some time prior thereto, and ever since, said date, plaintiff was and is the owner of fifty shares of the capital stock of the Idaho National Bank, a corporation organized under the National banking laws of the United States, with its principal place of business at Boise, Idaho, which said shares of stock were of the par value of $100.00 per share.

III

That during the latter part of October, 1917, plaintiff, while at Boise, Idaho, received information that one David Miller might desire at some future time to purchase as much of the outstanding stock in said Idaho National Bank as he could obtain, for the purpose of effecting a consolidation of said bank with the Pasific National Bank of Boise, Idaho. That the plaintiff desired to sell his said fifty shares of stock and was then about to leave Boise for his home in Oakland, California. That prior to his departure for California, and early in the month of November, 1917, plaintiff had an oral understanding with one T. J. Jones, who resides at Boise, Idaho, and who was also an owner of stock in said Idaho National Bank, and who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their said stock jointly, and that said Jones should notify plaintiff at his home in Oakland, California, whenever said Miller was ready to purchase their said stock.

IV

That a short time thereafter and early in the month of November, 1917, plaintiff went from Boise to his home at 5767 Shafter Avenue, Oakland, California, where he remained from early in November, 1917, until his return to Boise about the middle of February, 1918.

V

That on the 30th day of November, 1917, said T. J. Jones, acting under the arrangement with

plaintiff, set forth in Paragraph III hereof, presented to the defendant, at its office in Boise, Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks, supplied by defendant for that purpose, which message was in words and figures, as follows, to-wit:

"November 30, 1917.

"J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

"Miller advised Idaho National sold to Pacific offers me ninety dollars per share, otherwise wait year and chances of liquidation says if fails to get two-thirds stock liquidation will follow Will you take ninety dollars per share for yours. I am inclined to accept offer for mine. Answer. T. J. JONES."

That said defendant received and accepted said message and became thereby obligated to forward the same by telegraph to plaintiff in Oakland, California, and in consideration thereof, said T. J. Jones paid to the defendant the regular toll or charge for transmitting said message, amounting to sixty-five cents.

VI

That on account of the gross negligence of the defendant said message was never transmitted by defendant to plaintiff, and was consequently never received by plaintiff.

VII

That said T. J. Jones, by reason of his not receiving a reply from plaintiff to said message, made sev-

eral inquiries of defendant at its office in Boise, Idaho, between said 30th day of November and the 4th day of December, 1917, as to whether said message had been sent to plaintiff, and was informed by defendant that said message had been sent by defendant to plaintiff and had been delivered to plaintiff on December 1, 1917.

VIII

That said T. J. Jones relied upon and believed said statements of defendant that it had sent said message and delivered it to plaintiff on December 1, 1917, and concluded that plaintiff was on his way to Boise.

That said David Miller then had the money with him at Boise, Idaho, for the purchase of said bank stock of plaintiff and said T. J. Jones, and on or about the 4th day of December, 1917, said T. J. Jones sold his said bank stock to said David Miller for the sum of ninety dollars per share. That said David Miller was then ready and willing to buy plaintiff's fifty shares of said stock and to pay therefor the sum of Forty-five Hundred Dollars, and plaintiff was ready and willing to sell the same for that amount, and except for the gross negligence of defendant in failing to transmit said message to plaintiff, the plaintiff would have then sold his entire fifty shares of stock to said David Miller, and would have received therefor the sum of $4500.00.

IX

That plaintiff was not informed that said message had been delivered to defendant to be sent to him,

until his return to Boise, Idaho, from Oakland, California, about the middle of February, 1918, and immediately upon learning such fact, plaintiff, accompanied by said T. J. Jones, called at the defendant's office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, and the original message which was delivered by said T. J. Jones to defendant, on November 30, 1917, was then delivered by defendant to plaintiff.

X

That on or about the 15th day of February, 1918, said T. J. Jones received from defendant a letter, in words and figures as follows, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY,
(Incorporated), Manager's Office.

"Boise, Ida., Feb. 14, 1918.

"T. J. Jones, Atty at Law,
"Boise, Idaho.

"Dear Sir:

"I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland, failed in transmission.

"The employees concerned in the failure will be vigorously disciplined.

"I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted, and, in accordance with our custom in such cases, I enclose herewith the amount paid as tolls. Yours truly,

"G. H. HACKETT,
Manager."

That said letter contained a check for said sixty-five cents tolls paid by said T. J. Jones for transmitting said message, which said check was not accepted by said Jones or by plaintiff, but was returned by them to defendant.

XI

That ever since the time plaintiff first learned that said message had been delivered to defendant, to be sent to him, to-wit: about the middle of February, 1918, his said bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank and its assets are being applied to the payment of its outstanding debts.

That plaintiff is informed and believes, and therefore alleges upon information and belief, that the assets of said bank will not be greater in value than the said indebtedness, and that nothing will be available for the stockholders of said bank when such liquidation is closed.

XII

That by reason of the failure of defendant to transmit said message to him, plaintiff wholly lost the opportunity to sell his said bank stock, and has been unable at any time since to sell the same and said bank stock is still held by plaintiff and is without value, and by reason of such failure plaintiff has sustained damages in the sum of $4500.00.

XIII

WHEREFORE, plaintiff prays judgment against said defendant for the sum of Forty-five Hundred

Dollars, with interest thereon from December 1, 1917, at seven per cent per anum, until judgment, and for interest on said judgment, and for his costs and disbursements incurred herein.

RICHARD H. JOHNSON,
Attorney for Plaintiff.
Residence: Boise, Idaho.

(Duly verified.)
Endorsed: Filed June 13, 1919.
Stephen Utter, Clerk.
By Thos. E. Powell, Deputy.

(Title of Court and Cause.)

ANSWER

COMES NOW the above named defendant, and answering the complaint of plaintiff on file herein, admits, denies and alleges as follows:

FIRST FOR A FIRST DEFENSE

I

Admits that this defendant is and at the times mentioned in the complaint was a corporation, duly organized under and by virtue of the laws of the State of New York, and is now and was at all such times engaged in the business of transmitting messages by telegraph for hire, owned and operated wire connections between the cities of Boise, Idaho, and Oakland, California, and was at all times mentioned in the complaint and is now engaged in transmitting telegraphic messages for hire between said cities; but denies that this defendant is now or at any of the times mentioned in the complaint was a common carrier of such messages.

II

As to the allegations of Paragraph II of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that on the 30th day of November, 1917, or for some time prior thereto, or ever since said date or at any time or at all, plaintiff was or is the owner of fifty or any shares of the capital stock of the Idaho National Bank, a corporation organized under the National Banking Laws of the United States, with its principal place of business at Boise, Idaho, which said shares, or any shares, of stock were of the par value of $100.00 per share, or any other sum.

III

As to the allegations of Paragraph III of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial on that ground denies that during the latter part of October, 1917, or at any time or at all, plaintiff while at Boise, Idaho, or at any other place, received information that one David Miller might desire at some future time, or at any time, to purchase as much or any of the outstanding stock in said Idaho National Bank as he could obtain for the purpose of effecting a consolidation of said Bank with the Pacific National Bank of Boise, Idaho, or for any purpose, or that the plaintiff desired to sell his said fifty or any shares of stock or was then or at any other time about to leave Boise for his home in Oakland, California, or any other place, or that prior to

plaintiff's departure for California or any other place, or early in the month of November, 1917, or at any time or at all plaintiff had an oral understanding, or any understanding, with one T. J. Jones, who resides at Boise, Idaho, or who was also an owner of stock in said Idaho National Bank, or who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their stock jointly, or that such understanding was that said Jones should notify plaintiff at his home in Oakland, California, or any other place, whenever said Miller was ready to purchase their said stock, or any stock.

IV

As to the allegations of Paragraph IV, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that a short time thereafter or early in the month of November, 1917, or at any time or at all, plaintiff went from Boise to his home at 5767 Shafter Avenue, Oakland, California, or any other place, or that he remained there from early in November, 1917, or any other time, or until his return to Boise about the middle of February, 1918, or at any other time.

V

Admits that on or about the 30th day of November, 1917, said T. J. Jones presented to the defendant at its office in Boise, Idaho, a certain message which was typewritten upon one of the defendant's telegraph blanks supplied by defendant for that purpose,

which message was in words and figures as set forth in Paragraph V of said complaint; and defendant alleges that a true and correct copy of said message, together with the provisions and statements on the telegraph blank upon which it was written, is attached to this answer, marked Exhibit "A", and hereby referred to and made a part of this answer for the purpose of setting forth more fully the said message and the terms and conditions under which it was delivered to defendant and received by it. Admits that defendant received and accepted said message, but denies that defendant became thereby or otherwise obligated to forward the same by telegraph to plaintiff in Oakland, California, or elsewhere, except in accordance with the terms, conditions, rules and regulations printed upon said telegraph blank, as more fully shown by said Exhibit "A" hereto attached, and in this answer hereinafter alleged. Admits that said T. J. Jones paid to the defendant the regular toll or charge for transmitting said message, amounting to sixty-five cents (65c).

VI

Denies that on account of the gross negligence, or any negligence, of the defendant said message was never transmitted by defendant to plaintiff, or was consequently or otherwise never received by plaintiff.

VII

Denies that said T. J. Jones by reason of his not receiving a reply from plaintiff to said message, or for any reason, made several or any inquiries of defendant at its office in Boise, Idaho, or elsewhere,

between said 30th day of November and the 4th day of December, 1917, or at any time or at all, as to whether said message had been sent to plaintiff or in regard to said message in any way or at all, and denies that said T. J. Jones was informed by defendant that said message or any message had been sent by defendant to plaintiff or had been delivered to plaintiff on December 1st, 1917, or at any time or at all.

VIII

As to the allegations of Paragraph VIII of the complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground denies that said T. J. Jones relied upon or believed said or any statements of defendant that it had sent said or any message or delivered it to plaintiff on December 1st, 1917, or that said Jones concluded that plaintiff was on his way to Boise; denies that defendant ever made any statements that it had sent or delivered said message, as aforesaid, or otherwise. Denies that said David Miller then had the or any money with him at Boise, Idaho, for the purchase of said Bank stock, or any bank stock or other stock, of plaintiff or said T. J. Jones, or that on or about the 4th day of December, 1917, or at any time or at all said T. J. Jones sold his said bank stock, or any bank stock, to said David Miller for the sum of $90.00 per share, or for any sum, or that said David Miller was then ready or willing to buy plaintiff's fifty shares of said stock or any number of shares, or to

pay therefore the sum of $4,500.00, or any other sum, or that plaintiff was ready or willing to sell the same for that amount or any amount, or that except for the gross or any negligence of defendant in failing to transmit said message, or any message, to plaintiff the plaintiff would have then sold his said or any fifty shares of stock to said David Miller or would have received therefor the sum of $4,500.00, or any other sum.

IX

As to the allegation that plaintiff was not informed that said message had been delivered to defendant to be sent to him until his return to Boise, Idaho, from Oakland, California, or elsewhere, about the middle of February, 1918, or at any other time, this defendant has no knowledge, information, or belief sufficient to enable it to answer, and basing its denial upon that ground denies such allegation and each and every part thereof. Admits that about the middle of February, 1918, plaintiff, accompanied by said T. J. Jones, called at the defendant's office in Boise, Idaho, and was informed that said message had never been sent to plaintiff, but denies that the original message which was delivered by said T. J. Jones to defendant on November 30, 1917, or at any other time, was then delivered by defendant to plaintiff, or that plaintiff and said Jones, or plaintiff or said Jones, called at defendant's office immediately upon plaintiff's learning that said telegram had been delivered to defendant to be sent to him.

X

Admits that on or about the 15th day of February, 1918, said T. J. Jones received from defendant that certain letter in words and figures as set out in Paragraph X of the complaint herein, and that said letter contained a check for said 65c tolls paid by said T. J. Jones for transmitting said message, and that said check was not accepted by said Jones or by plaintiff, but was returned by them to defendant.

XI

As to the allegations of Paragraph XI, this defendant has no knowledge, information or belief sufficient to enable it to answer, and basing its denial upon that ground defendant denies that ever since the time plaintiff first learned that said message had been delivered to defendant to be sent to him, to-wit: about the middle of February, 1918, or at any time or at all, plaintiff's said or any bank stock has had no market value whatever, for the reason that said Idaho National Bank went into liquidation and is no longer operating as a bank, and its assets are being applied to the payment of its outstanding debts, or for any other reason or at all, or that the assets, or any assets, of said bank will not be greater in value than the said or any indebtedness, or that nothing will be available for the stockholders of said bank when such liquidation is closed, or at any time or at all.

XII

Denies that by reason of the failure of defendant

to transmit said or any message to him, plaintiff wholly or otherwise lost the opportunity to sell his said or any bank stock, or has been unable at any time since to sell the same, or that said Bank stock is still held by plaintiff or is without value, or that by reason of such failure plaintiff has sustained damages in the sum of $4,500.00, or any other sum.

SECOND FOR A SECOND SEPARATE AND FURTHER DEFENSE

I

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all times herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce, and that the message alleged to have been delivered by said T. J. Jones to defendant was an interstate message to be sent from a point in the State of Idaho to a point in the State of California, and was as such interstate commerce, and that said message was delivered to and accepted by the defendant subject to the terms of a certain contract in writing, a copy of which is attached to this answer, marked Exhibit "A", made a part hereof and hereby referred to for a more full and complete statement of the terms of said contract.

II

That as more fully appears from said Exhibit "A", attached hereto, it was a term and condition of the said contract subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for damages or statutory penalties in any case where the claim therefor was not presented in writing within sixty days after the telegram was filed with the Company for transmission, and that no claim in writing was presented to defendant within sixty days after the telegram was filed with defendant for transmission, or at any time or at all, except on or about the 18th day of June, 1918, when plaintiff addressed a letter to defendant's manager at Boise, Idaho, demanding payment of the sum of $4,500.00, with interest from and after the 9th day of December, 1917.

III

That by the Act of Congress approved June 18, 1910 (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve,

alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

IV

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

V

That the said stipulation in the contract subject to which said message was accepted, to the effect that claim in writing for any damages should be made within sixty days after the message was filed for transmission, was reasonable and valid and binding upon the plaintiff herein, and free from any regulation or control on the part of the State of Idaho.

THIRD FOR A THIRD SEPARATE AND FURTHER DEFENSE

I

That defendant is now and at all the times mentioned in the complaint herein was a corporation duly organized under and by virtue of the laws of the State of New York, and is now and at all times

herein mentioned was engaged in the business of transmitting telegraph messages for hire between the cities of Boise, Idaho, and Oakland, California, and elsewhere in interstate commerce.

II

That the message referred to in the complaint was delivered to and accepted by the defendant subject to the terms of a certain contract in writing, a copy of which is hereto annexed, marked Exhibit "A", hereby referred to, and made a part of this answer.

III

That as more fully appears from Exhibit "A", hereto annexed, it was a term and condition of the said contract, subject to which, and subject to which only, such message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message beyond the amount received for sending the same; and that the said message was an unrepeated message and defendant was not directed or requested to repeat the same and all that the defendant received in exchange for its obligation in respect to said message was the sum of 65c, which was defendant's ordinary and reasonable charge for the transmission of such a message, without repetition, from the point of origin to the point of destination named therein, including its delivery at destination.

IV

That such message was an interstate message, to

be sent from a point in the state of Idaho to a point in the State of California, and was, as such, interstate commerce.

V

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into "repeated" and "unrepeated"; a repeated message, as the name implies, being a message which the defendant agress that the office of destination shall transmit back, after receiving it, to the point of origin, in order to avoid mistakes, etc.; that in the case of unrepeated messages defendant assumes no liability (except for gross negligence) beyond the amount received for sending the same, while in the case of repeated messages defendant does not undertake to limit its liability to the amount received for sending them, but assumes, on the contrary, liability for not to exceed fifty times the amount received for sending the message (except in so far as such liability may be further limited by other provisions of the contract); and that for the additional work of repeating a message and the additional risk of liability assumed in the case of a repeated message, the defendant, at all the times mentioned, made and still makes an additional charge equal to one-half of the unrepeated message rate.

VI

That by the Act of Congress approved June 18,

1910, (36 Stat. L. 539) the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

VII

That the said Interstate Commerce Commission, prior to the filing of the message sued on and prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not at any time alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which, and of all the premises, the defendant says that the stipulation in the contract, subject to which this message, if any, was accepted,

to the effect that the defendant's liabiliy should not, in any event, exceed the sum of sixty-five cents, was reasonable and valid and binding on the plaintiff herein, and free from any regulation or control on the part of the State of Idaho or any other State, so that the defendant ought not to be liable, in any event, in this action beyond the sum of sixty-five cents, with interest from the first day of December, 1917.

FOURTH FOR A FOURTH SEPARATE AND FURTHER DEFENSE

I

Defendant repeats all the allegations of the third separate and further defense herein.

II

Alleges that as more fully appears by Exhibit 'A", hereto, annexed, it was a term and condition of the said contract, subject to which, and subject to which only, the said message was accepted by the defendant, that the defendant should not be liable for mistakes or delays in the transmission or delivery or for non-delivery of a message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount the said message was valued by the sender thereof.

III

That such message was an interstate message, to be sent from a point in the State of Idaho to a point in the State of California, and was, as such, interstate commerce.

IV

That by the defendant's established rules, regulations and tariffs, as the same were in effect prior to June 18, 1910, and are still maintained and established, messages are classified, among other classifications, into messages valued by the senders thereof at fifty dollars, and messages valued by the senders thereof at some specified sum in excess of fifty dollars; that all defendant's ordinary rates and tariffs for the transmission and delivery of messages are based on the assumption that the message is valued at fifty dollars or less, and that in the case of a message valued at a specified sum in excess of fifty dollars, it was at all the times mentioned and still is the rule, regulation, tariff and practice of the defendant to charge and collect an additional sum to cover the increased risk of liability, which additional sum is based on the valuation and is equal to one-tenth of one per cent thereof.

V

That by the Act of Congress, approved June 18, 1910, (36 Stat. L. 539), the Congress of the United States entered and assumed charge of regulating the field of interstate communication by telegraph, and thereby removed and exempted such interstate communication by telegraph from the field of State regulation or interference, and undertook to and did confer upon the Interstate Commerce Commission full power over the rates, charges, facilities, classifications and practices of telegraph companies engaged in interstate commerce with reference to such

interstate commerce, and in particular conferred on the Interstate Commerce Commission power to approve, alter or acquiesce in existing rates and classifications, which power the Interstate Commerce Commission has ever since retained and still retains.

VI

That the said Interstate Commerce Commission, prior to the commencement of this action, had full knowledge of the rates, charges and classifications established by the defendant as above described, and, with such knowledge, acquiesced in and approved the same, and did not, at any time, alter or seek to alter such rates, charges, classifications or regulations, and thereby recognized the right of the defendant to charge a higher rate for a greater liability and a lower rate for a less liability, as above described.

By reason of which and of all the premises defendant says that it ought not to be liable to the plaintiff in this action in any event beyond the sum of fifty dollars, with interest from the 1st day of December, 1917.

WHEREFORE, having fully answered the complaint of plaintiff herein, defendant prays that plaintiff take nothing by his said action, that defendant be dismissed hence without day, and that defendant have judgment for its costs and disbursements in this action, most unjustly expended.

RICHARDS & HAGA,
Attorneys for Defendant.
Residence: Boise, Idaho.

(Duly verified.)

EXHIBIT A

WESTERN UNION

Class of Service		Form 1206
Desired	Western Union	Receiver's No.
Fast Day Message	TELEGRAM	M. B. 60
Day Letter		Check
Night Message		49 pdnl.
Night Letter X		Time Filed

Patrons should mark an "X" opposite the class of service desired; OTHERWISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.

NEWCOMB CARLTON, President.

GEORGE W. E. ATKINS, First Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, November 30, 1917.

J. A. CZIZEK,
5767 Shafter Avenue
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES.
(454 Yates B)
(.65c) (408-W)

All telegrams taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

8. *No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH COMPANY, Incorporated.

NEWCOMB CARLTON, *President.*

CLASSES OF SERVICE

FAST DAY MESSAGES

A full-rate expedited service.

NIGHT MESSAGES

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

DAY LETTERS

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS:

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those numerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the

addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

NIGHT LETTERS

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing busines day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS:

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the ad-

dressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

Endorsed: Filed December 22, 1919.
W. D. McReynolds, Clerk.

(Title of Court and Cause)

DECISION

April 28, 1920

Richard H. Johnson, Attorney for Plaintiff.

Richards & Haga, Attorneys for Defendant.

DIETRICH, *District Judge*:

This suit is brought to recover damages for failure of the defendant to send the following telegram:

"November 30, 1917.

"J. A. Czizek,
"5767 Shafter Avenue,
"Oakland, Calif.

"Miller advises Idaho National sold to Pacific Offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

"T. J. JONES."

It is admitted, or the evidence conclusively shows, that the message, written upon a regular blank form, was filed for transmission in the defendant's office at Boise, Idaho, on November 30th, 1917, the charges being prepaid upon the basis of the established tariffs for ordinary messages; that it was never delivered to the plaintiff and indeed was not transmitted at all; that on February 14th, 1918, for the first time, the plaintiff learned that the message had been filed, and the sender that it had not been delivered; and upon that date together they made inquiry at the defendant's Boise office, whereupon, after investigation, the manager of the office addressed a letter to the sender, dated February 14th, acknowledging the failure to transmit and tendering a return of the charges paid; that there was no written or formal demand for damages by plaintiff until June 18th, 1918, at which time he presented a claim in writing for $4,500.00, on the theory that the fifty shares of bank stock owned by him were, and ever since the middle of February, 1918, had been, worth that sum, whereas if the telegram had been promptly delivered he could and would have sold the same for $90.00 per share. In response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of the plaintiff's failure to make demand within the period specified on the telegraph blank.

While the point is controverted, I think it also clear that in filing the message the sender was acting

for the plaintiff and as his agent. Fairly construed, the complaint so implies, and in his letter or demand of June 18th the plaintiff uses this language: "It (the message) was sent to me by my associate and agent, Mr. T. J. Jones, of Boise, Idaho." This view, it may be added, is also corroborated by other circumstances shown in evidence.

I further find that Miller desired and was able to buy the stock at $90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of $90.00, and, had it been delivered, such is the meaning it would have conveyed to him. Besides the contention that no damage can be recovered because at most the message advised the plaintiff only of an offer to buy and there is no way of knowing whether he would or would not have accepted, defendant relies upon three defenses predicated upon the printed conditions endorsed upon the blank form upon which the message was written. This endorsement is as follows:

> "To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:
>
> "1. The Company shall not be liable for mis-

takes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of one per cent. thereof.

* * * * * * * * * * *

"6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission."

The message being interstate in its character is subject to Federal law, and these clauses are to be

considered in the light of the Interstate Commerce Act, especially as amended by the Act of June 18th, 1910, 36 Stat. 539. *Postal Telegraph Co.* vs. *Warren-Goodwin L. Co.*, (U. S. Supreme Court decision, December 8, 1919). *Western Union Tel. Co.* vs. *Boegli* (U. S. Supreme Court decision, January 12, 1920). Certain general principles involved are thought to be illuminated by the following cases: *B. & M. R. R. Co.* vs. *Hooker*, 233 U. S. 97. *Erie R. R. Co.* vs. *Stone*, 244 U. S. 332. *Georgia F. & A. R. Co.* vs. *Blish. M. Co.*, 241 U. S. 190. *St. Louis I. M. & S. Co.* vs. *Starbird*, 243 U. S. 592. *Southern Pac. R. R. Co.* vs. *Stewart*, 248 U. S. 446. *Gardner* vs. *Western Union Tel. Co.*, 231 Fed. 405. *Western Union Tel. Co.* vs. *Lange*, 248 Fed. 656. *Gooch* vs. *Oregon Short Line R. R. Co.* (C. C. A., 9th Cir., Decision filed April 5, 1920.)

It should be added that the form of the telegraph blank here involved, with the indorsement thereon, had been regularly filed with the Interstate Commerce Commission and had been published as required by law.

Under the cases cited, it is thought to be clear that stipulations requiring claims for damages to be presented in writing within a specified period are valid and binding when reasonable in their terms and not prohibited by statute or opposed to considerations of public policy. As applied to the facts of this case, the requirement that demand in writing must be presented within sixty days from the filing of the message, if construed literally, would have

to be held unreasonable, for the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of that time. But I am inclined to think that the proper view to take of the provision is that the period of limitation did not begin to run until the plaintiff learned of the default and that he had sixty days thereafter in which to present his claim. I do not find that the precise point has been passed upon, but such seems to be the view implied in *Telegraphic Co.* vs. *Nichols*, 159 Fed. 643, and *Telegraph Co.* vs. *Lee*, 192 S. W. 70.

Admittedly the plaintiff had full knowledge on February 14th, but did not make demand until June 18th, a period of a little more than four months. If I have properly interpreted the stipulation, it necessarily follows that the claim is barred.

Were the question one of first impression, I would have difficulty in declining the view that the "repeated telegram" clause is applicable and binding. In terms it covers non-delivery as well as errors in transmission and delays, and, under the evidence, it appears that "repeated" messages are so handled that failure to transmit is less likely to occur than in a case of ordinary messages. But in the Lange case (248 Fed. 656), involving facts somewhat different, it is true, the Circuit Court of Appeals for this circuit reached a contrary conclusion, which is deemed to be controlling.

The validity and applicability of the "specially valued" clause are challenged upon two grounds:

It is first urged that the charges for telegrams of that class are unreasonable and prohibitive. But such objection is not thought to be available to the plaintiff in an action of this character. *Erie R. R. Co.* vs. *Stone,* 244 U. S. 332. The other contention is that the default under consideration constitutes "gross negligence" and that it was incompetent for defendant to stipulate against responsibility therefor. "Gross negligence" is a phrase of vague and flexible import, and, as often used, its meaning is obscure. There is no evidence that the defendant willfully or fraudulently withheld the message from its wires. The failure was doubtless due to a want of care on the part of an office employe, but I do not think it could be held that with the exercise of ordinary care such a default would be impossible. There is nothing unusual on the face of the message—nothing to impress those into whose hands it may have come that it was of special importance; and no suggestion to that effect was made when it was filed. The very purpose of "repeated" or "specially valued" messages, it is to be assumed, is to put employes on their guard and to protect the Company against a default of this character as well as against errors in transmission, and delays. The statute expressly recognizes such clasifications, and if the tariff is too high, the remedy, as already indicated, is with the Interstate Commerce Commission. The plaintiff is bound by the conditions he accepted, and he cannot now escape the obligations thereof by claiming that the charges for sending a "valued"

telegram would have been excessive.

As already stated, the other defense is that the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram. It involves the question whether he would or would not have embraced the opportunity of which the telegram was intended to advise him, and, if so, whether he could and would have delivered the stock, which was then held in a San Francisco bank, as collateral, while Miller was willing and able to keep his offer good. The inherent difficulty, held to be insuperable in many of the cases, is the impossibility of determining what, in the exercise of his independent judgment, a man would have decided to do in a given contingency which never happened. Would the plaintiff have accepted the offer? Jones, the sender of the message, did, after some consideration of the conditions as he knew them, decide to accept a similar offer for his stock. However, it will be noted that he made no recommendation to the plaintiff, and in the telegram avoided the expression of any very positive opinion as to what was best to do. He said only: "I am inclined to accept for mine." We have no way of knowing whether the plaintiff, who was necessarily ignorant of the precise situation, would have sought to negotiate for a higher price and thus lost the opportunity. Manifestly, to take advantage of the offer it was necessary to act promptly, for there was a crisis in the affairs of the bank and apparently in Miller's financial ability, and counsel for the de-

fendant argue with much plausibility that even had the telegram been sent and delivered plaintiff would not have been able to get the stock to Boise within the required time. Applying the principle recognized in many, and, so far as I am advised, most, of the decided cases, I feel impelled to sustain the defense. *Western Union Tel. Co.* vs. *Hall*, 124 U. S. 444. *Richmond H. Mills* vs. *Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290. *Bennett* vs. *Western Union Tel. Co.*, 129 Ia. 607, 106 N. W. 13. *Smith* vs. *Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126. *Western Union Tel. Co.* vs. *Odams Mach. Co.*, 92 Miss. 849, 47 So. 412. *Cherokee T. Ex. Co.* vs. *Western Union Tel Co.*, 143 N. C. 376, 55 S. E. 777. *Harmon* vs. *Western Union Tel. Co.*, 65 S. C. 490, 43 S. E. 959. *Beatty L. Co.* vs. *Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309. *Fisher* vs. *Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545. *Western Union Tel. Co.* vs. *Watson*, 94 Ga. 202, 21 S. E. 457. *Bass* vs. *Postal Tel Cab. Co.*, 127 Ga. 423, 53 S. E. 465. *Wilson vs. Western Union Tel. Co.*, 124 Ga. 131, 52 S. E. 153. *Western Union Tel. Co.* vs. *Webb*, 48 So. 408. *Western Union Tel. Co.* vs. *Ferguson*, 54 L. R. A. 846. *Hall* vs. *Western Union Tel. Co.*, 27 L. R. A. (N. S.) 639.

Endorsed: Filed April 29, 1920.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

JUDGMENT

This cause having come on to be heard on the 28th day of February, 1920, before the Court with-

out the intervention of a jury (the parties through their attorneys of record having before the commencement of the trial filed with the Clerk a stipulation in writing waiving a jury), Richard H. Johnson, Esq., appearing for plaintiff and Messrs. Richards & Haga appearing for defendant, and the Court having heard the evidence, oral and documentary, introduced by the respective parties, and being fully advised in the premises, finds, concludes and decides in favor of the defendant.

Wherefore, upon motion of Messrs. Richards & Haga, attorneys for defendant, it is hereby considered, ordered and adjudged that the said plaintiff take nothing by his complaint herein, and that defendant have judgment for its costs expended in this action, taxed at $42.45.

Done in open Court this 8th day of May, 1920.

(Signed) FRANK S. DIETRICH,
District Judge.

Endorsed: Filed May 11, 1920.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

NOTICE OF ENTRY OF JUDGMENT

To J. A. Czizek, the above named plaintiff, and to Richard H. Johnson, Esq., attorney of record:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED, That a written decision and judgment in the above entitled cause was made and entered in the above entitled Court on the 8th day of May, 1920.

A copy of such judgment is hereby served upon you.

RICHARDS & HAGA,
Attorneys for Defendant.

Endorsed: Filed May 11, 1920.
W. D. McReynolds, Clerk.

Service of the above Notice is hereby acknowledged this 8th day of May, 1920.

RICHARD H. JOHNSON,
Attorney for Plaintiff.

(Title of Court and Cause.)

BILL OF EXCEPTIONS

This was an action at law originally commenced in the District Court of Ada County, State of Idaho, to recover $4500 damages for failure to transmit a telegraphic message. The complaint was filed June 13th, 1919, and on July 2nd, 1919, the defendant filed its petition for removal to the above entitled Court and at the same time filed a bond on removal in due form together with a demurrer to the complaint. The petition for removal, regular in form, was based on the ground that the plaintiff, at the time of the commencement of the action, was a citizen and resident of the State of Idaho, and that the defendant corporation was a citizen and resident of the State of New York, and that the amount involved exceeded the jurisdictional amount of $3000 exclusive of interest and costs. The record was thereafter removed to this Court by the clerk, and the plaintiff duly filed a motion to remand the case to the State Court and

supported the same by affidavits. The following are copies of the motion to remand together with the affidavits filed in support thereof:

(Title of Court and Cause.)

MOTION TO REMAND

Comes now the plaintiff, J. A. Czizek, by his attorney Richard H. Johnson, and appearing specially for the purpose of this motion only, saving and reserving any and all objections to the insufficiency of the petition for removal herein and expressly denying that this Court has jurisdiction of this action or of the plaintiff herein, respectfully moves the Court to remand said action to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, from whence it was removed, for the reason that at the time of the commencement of said action and ever since said time, the plaintiff was and is a resident and citizen of the State of California, and the defendant at the time of the commencement of said action was and ever since has been a corporation organized under and by virtue of the laws of the State of New York, and a resident and citizen of the State of New York.

This motion is made upon the records and files herein and upon the affidavit of plaintiff heretofore filed herein and upon the affidavits of F. E. Parfitt, John F. Koelsch, Frank Struckman, Ed Roden and William Patterson, which are filed herewith.

Dated September 12, 1919.

(Signed) RICHARD H. JOHNSON,

Attorney for Plaintiff, appearing specially for the purposes of this motion only.

State of Idaho,
County of Ada,—ss.

J. A. Czizek, being first duly sworn upon his oath, deposes and says: that he is the plaintiff in the above entitled action and has read the foregoing motion and knows the contents thereof, and that the facts therein stated are true.

(Signed) J. A. CZIZEK.

Subscribed and sworn to before me this 9th day of August, 1919.

(Signed) RICHARD H. JOHNSON,
Notary Public.

(Notarial Seal) Residence: Boise, Idaho.

(Title of Court and Cause.)

AFFIDAVITS

State of Idaho,
County of Ada,—ss.

J. A. Czizek, being first duly sworn deposes and says: That he is the plaintiff in the above entitled action, and has read the petition of the above named defendant filed herein for the removal of said action into the District Court of the United States for the Southern Division of the District of Idaho.

That at the time of the commencement of this action and for a long time prior thereto, and ever since said action was commenced, affiant was not and is not now, a citizen or resident of the State of Idaho, but at the time said suit was begun, and for some time prior thereto and ever since, affiant was and is now a citizen and resident of the State of California,

and during such times had and still has his home and residence in the City of Oakland, in said State of California and during all of such times and at the time said suit was begun and ever since, affiant has resided and still resides, with his family consisting of his wife and son in his home in said City of Oakand and his visits to the State of Idaho during such time were and are only temporary and for the purpose of looking after his business interests in said State of Idaho.

And further affiant saith not.

(Signed) J. A. CZIZEK.

Subscribed and sworn to before me this 2nd day of July, 1919.

(Seal) C. S. RATHBUN,
Notary Public.
Residence: Boise, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

State of California,
County of San Mateo,—ss.

F. E. Parfitt, being first duly sworn deposes and says: I am a citizen of the United States, over the age of 21 years and am well acquainted with Jay A. Czizek, the above named plaintiff. I first became acquainted with the said Jay A. Czizek in the summer of 1915, at which time I was the Manager of the College Avenue Branch of the Security Bank of Oakland, California. Mr. Czizek purchased a home in Oakland in July, 1915, and thereupon moved there

with his family consisting of his wife and son and mother-in-law, where they have since resided.

I have often visited Mr. Czizek's home in Oakland and saw Mr. Czizek on many occasions. He has often expressed to me voluntarily, both prior and since June 13, 1919, that his home and residence was in Oakland, California. He has also often expressed to me that he was trying to dispose of his many holdings in other states and concentrate them in the State of California.

(Signed) F. E. PARFITT.

Subscribed and sworn to before me this 18th day of August, 1919.

(Notarial Seal) P. E. LAMB,

Notary Public in and for County of San Mateo, State of California.

(Title of Court and Cause.)

AFFIDAVIT

J. F. Koelch, being first duly sworn deposes and says: that he is a citizen of the United States, over the age of twenty-one years, and resides in Boise, Idaho. That he is engaged in the business of auditor and accountant. That he has been acquainted with the plaintiff for more than ten years last past, and for some time past has been in the employ of said plaintiff in keeping his books in connection with plaintiff's business interests in Idaho, and was employed for this purpose by plaintiff, by reason of the fact of plaintiff's frequent and long-continued absence from the State of Idaho, at his home in California and other places.

That on account of affiant's business relations with plaintiff and from voluntary statements made to affiant by plaintiff, prior to June, 1919, affiant knows of his own knowledge that on June 13, 1919, and for some time prior thereto, plaintiff was a citizen and resident of the State of California, and that his home was at that time and still is in the city of Oakland in said State, where he purchased a home and where he has resided with his family for some time prior and ever since the month of June, 1919.

(Signed) J. F. KOELSCH.

Subscribed and sworn to before me this 11th day of September, 1919.

(Signed) RICHARD H. JOHNSON,

(Notarial Seal) *Notary Public.*

Residence: Boise, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

Frank Struckman, being first duly sworn, upon his oath deposes and says: that he is a citizen of the United States, over the age of twenty-one years and resides at Warren in said County of Idaho, where he is engaged in business. That he has known plaintiff for many years and that he has on several occasions prior to the month of June, 1919, heard Mr. Czizek say he would never reside in Idaho again and that he had and owned his home in California and would educate his son there who is now and has been attending the schools of California for many years.

(Signed) FRANK STRUCKMAN.

Subscribed and sworn to before me this 8th day of September, 1919.

(Notarial Seal) WALTER MARTIN,
Notary Public.
Warren, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

State of Idaho,
County of Idaho,—ss.

Ed. Roden, being first duly sworn upon his oath deposes and says: that he is a citizen of the United States, over the age of twenty-one years and resides at Warren in said County of Idaho, where he is engaged as a Hotel Proprietor.

That he has been acquainted with the plaintiff, Jay A. Czizek for many years. That prior to the general state and county election held in November, 1918, the said Jay A. Czizek had been a member of the County Central Committee of the Democratic party for said Idaho County. That after said election said Jay A. Czizek refused to serve any longer as such County Committeeman and stated that his reasons for such refusal were that he was no longer a legal resident of the State of Idaho, and that his home and legal residence were in the State of California.

That affiant has heard the said Jay A. Czizek on several occasions prior and subsequent to June 13, 1919, say that his home and residence were in the State of California, and that the health of his wife

had improved so greatly after they went to California that he had decided to make his permanent home there.

(Signed) ED. RODEN.

Subscribed and sworn to before me this 1st day of September, 1919.

(Signed) WALTER MARTIN,

(Notarial Seal) *Notary Public.*

Residing at Warren, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

State of Idaho,

County of Idaho,—ss.

William Patterson being duly sworn, upon his oath deposes and says: that he is a citizen of the United States, over the age of twenty-one years and resides at Warren in said County of Idaho, where he is engaged in merchandising. That he has been acquainted with plaintiff, J. A. Czizek for many years and that frequently he has heard plaintiff say, prior to the month of June, 1919, that he was disposing of his real estate and everything other than his mining property, in the State and would concentrate whatever investments made in and around his home in California.

(Signed) WILLIAM PATTERSON.

Subscribed and sworn to before me this 8th day of September, 1919.

(Notarial Seal) WALTER MARTIN,

Notary Public.

Warren, Idaho.

Thereafter counter affidavits were filed by defendant, copies of which are as follows:

(Title of Court and Cause.)

AFFIDAVIT

State of Idaho,
County of Idaho,—ss.

Henry Telcher, being first duly sworn, deposes and says: That he is Clerk of the District Court and Ex-officio Auditor and Recorder of Idaho County, State of Idaho, and as such officer has custody and possession of the registration and voting records in said County; that it appears from said records that the above named plaintiff, J. A. Czizek, is a registered voter in Warren Precinct in said Idaho County, and that he voted at the state and national election in 1916 and the state election in 1918 in said precinct.

Further affiant saith not.

(Signed) HENRY TELCHER.

Subscribed and sworn to before me this 25th day of September, 1919.

(Signed) R. F. FULTON,
(Notarial Seal) *Notary Public for Idaho.*
Residing at Grangeville, Idaho.

(Title of Court and Cause.)

AFFIDAVIT

United States of America,
State of Idaho,
County of Ada,—ss.

McKeen F. Morrow, being first duly sworn, upon his oath deposes and says: That he has examined

the Visitors' Register at the Idanha Hotel, where plaintiff, J. A. Czizek, usually stays when in Boise; that said J. A. Czizek registered in said Visitors' Register at said hotel from Warren, Idaho, on June 7th, 1919, on June 25th, 1919, and on July 23rd, 1919, writing the word "Warren" after his name in each case under the word "Residence".

Further affiant saith not.

(Signed) McKEEN F. MORROW.

Subscribed and sworn to before me this 9th day of October, 1919.

(Signed) ALTA F. KNAPP,

(Notarial Seal) *Notary Public for Idaho.*

Residing at Boise, Idaho.

STATE OF IDAHO

DEPARTMENT OF STATE

I, Robert O. Jones, Secretary of State of the State of Idaho, do hereby certify that the records of this office show that Jay A. Czizek of Warren, Idaho County, Idaho, was duly and regularly appointed to the office of Commissioner of Immigration, Labor and Statistics for the State of Idaho for the term of two years beginning January 25, 1915, and ending January 25, 1917.

I further hereby certify that according to the said records Mr. Czizek served his full term.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise, the Capital of Idaho, this 9th day of October, in the year of our Lord One Thousand Nine

Hundred and Nineteen, and of the Independence of the United States of America the One Hundred and Forty-fourth.

(Signed) ROBERT O. JONES,
(Seal) *Secretary of State.*

The foregoing affidavits constitute all of the evidence before the Court used upon said motion to remand. On the 10th day of October, 1919, after argument of the motion to remand, the Court decided that plaintiff at the time the action was commenced, was a citizen and resident of Idaho, and made and entered an order denying the motion, a copy of which order is as follows:

(Title of Court and Cause.)

ORDER DENYING MOTION TO REMAND

This cause coming on regularly to be heard this 10th day of October, 1919, at 10 o'clock A. M., on plaintiff's motion to remand, and the Court having considered the records and files in this action, including the affidavits in support of such motion and the counter-affidavits filed by defendant, and the cause having been argued and submitted, and the Court being fully advised in the premises,

Now, therefore, it is hereby ORDERED, that said motion to remand be, and the same is hereby, denied and overruled.

IT IS FURTHER ORDERED That plaintiff be allowed an exception to such ruling.

After the Court announced his ruling in said motion, counsel for plaintiff asked leave to make a further showing as to the residence and citizen-

ship of plaintiff at the time the action was commenced and since that time, which, upon objections being made by counsel for defendant, was denied by the Court.

Dated this 10th day of October, 1919.

(Signed) FRANK S. DIETRICH,
District Judge.

To which order of the Court counsel for plaintiff then and there excepted, which exception was duly allowed by the Court.

Thereafter and on the 28th day of February, 1920, the said cause came on for trial before the Hon. Frank S. Dietrich, District Judge, without a jury, a stipulation waiving a jury having been signed by the attorneys for the respective parties and filed in said cause, Richard H. Johnson, Esq., appearing as counsel for plaintiff and Messrs. Richards and Haga and McKeen F. Morrow appearing as counsel for the defendant. At the request of counsel, the Court made an order that all adverse rulings of the Court should be deemed excepted to. The following constitutes all of the evidence, documentary and oral, which was introduced at the trial:

T. J. Jones, produced as witness on behalf of plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Johnson:

"I am sixty-two years of age and reside in Boise, Idaho, and am a lawyer by profession. I am acquainted with the plaintiff, J. A. Czizek, and prior to November 30th, 1917, I was acquainted with one David Miller and was also acquainted with an insti-

tution known as the Idaho National Bank. I was a stockholder in that bank prior to December 4th, 1917, and owned individually, fifteen shares of stock. The par value of that stock was $100.00 a share. Prior to November 30th, 1917, or along during that month or in October, I had a conversation with the plaintiff, Mr. Czizek with reference to the bank stock. Mr. Czizek and I were both stockholders. I had fifteen shares and Czizek had fifty. As I was here practically all the time and Czizek was here only occasionally, it was understood and agreed that neither of us was to sell unless we both sold, and that we were to try and get par, that is, the par value of the stock. Yes, in another conversation there was something said with reference to Mr. Miller being a possible purchaser. The last talk I had with Mr. Czizek prior to the sale of the stock which I think was in November, possibly in October, Mr. Czizek said that Mr. Miller would be here and he would have plenty of money to take care of and buy all the stock that Miller might deem was necessary to get control of the Idaho National or to consolidate with the Pacific National and make one good bank out of the two. And I knew that Mr. Miller was negotiating with the Pacific National Bank and I knew from talks that I had had with Miller that he was negotiating to build up the Idaho National Bank. Mr. Miller at that time was Vice President of the Idaho National. He then owned stock at that time. He had paid me for what was known as the Fletcher stock, $15,000 for two hundred shares. I

had a good many conversations directly with Mr. Miller with reference to this stock."

Q. (By MR. JOHNSON): Well, it is not necessary to detail them all, but what was it in substance?

MR. MORROW: If the Court please, we object to any evidence as to conversations had by the witness with Mr. Miller regarding the purchase of the stock in question, being the stock of the plaintiff, or other stock of the Idaho National Bank, about this time, on the ground that it is hearsay and incompetent, irrelevant, and immaterial to prove or disprove any of the issues in this case, the question being, under the pleadings, and being placed in issue, that at the time this telegram was sent and shortly thereafter Mr. Miller was ready and willing to purchase the plaintiff's stock, and we think that evidence as to what Mr. Miller may have told the witness is clearly hearsay, and object to it on that ground, and on the ground that no proper foundation has been laid for the introduction of such evidence.

THE COURT: What do you offer this for, Mr. Johnson?

MR. JOHNSON: We don't offer it for the purpose of proving what Mr. Miller's action might have been, but merely the facts leading up to the sending of this telegram as alleged in the complaint. We will offer other proof on the other question.

THE COURT: Well, with that understanding, I think I shall let it go in, as merely explanatory of the circumstances.

MR. JOHNSON: That is all right.

THE COURT: You may proceed.

WITNESS: What was the question?

THE COURT: Q. What were these conversations, in substance, your conversations with Mr. Miller?

A. Well, the conversation on the 30th of November I think was in 1917, that is, the day the message was sent, Mr. Miller wanted to know what stock I controlled and could deliver and I told him sixty-five shares, my stock and Czizek's stock. This conversation took place in Boise on the street. And I think later in the day Mr. Miller came up to my office, and we made an appointment for that evening, in the Idaho National Bank; and that evening we met in the Idaho National Bank, and there was present Mr. Miller and myself in the front end of the bank, and in the rear end of the bank Miss Nellie Wilson was present, and we took up the question of the stock, and he offered $90.00 a share for the 65 shares, mine and Czizek's, and started to get a statement showing that that was all the stock was worth at that time, and stated that his purpose in getting the stock was so that he could control the bank, and if he didn't get the stock that the bank would go into liquidation, and it would be a year or eighteen months before we would get anything, and if the bank realized on all its papers and the surplus funds, the most we could hope to get would be $110.00 a share, and we might not get anything. At that point I interrupted him, and I said, "Miller, there is no use in discussing the purchase of this stock unless

you have got the money to pay for it, a cash transaction." And as I recall it, there was a book lying on the counter—the desk run this way, and inside there was a long counter, and there was a book lying there. He says, "There is the books and there is Nellie," meaning Nellie Wilson. And I went over to Nellie, and I said, "Nellie, Miller is figuring on buying this stock." And she said, "Does that include Czizek's stock?" And I said, "Yes. Has Miller the money to pay for it?" She said, "Sell. He has got money enough here to take care of any check that he will issue for you." I got Czizek's address from Nellie. The bank had his address. And went back to Miller and pencilled a telegram and read it to Miller, and he said it was satisfactory, and I took it back to Nellie, and she run it off in triplicate. I came back to Miller and read the telegram, and I struck out one word and he added one word. The word I struck out was "here" and I wrote in ink "year". And he wrote in ink at the end of the message the word "answer".

MR. JOHNSON: I would like to have this marked as Plaintiff's Exhibit No. 1 for identification.

Said document was thereupon marked Plaintiff's Exhibit No. 1.

WITNESS: Plaintiff's Exhibit No. 1 for identification is a telegram, the telegram that I prepared in triplicate in the bank on that evening. It is one of the three. I gave one to Miller and I took the other two up to the office. I left one in the office and I gave the other to my son Felix and told him

to take it up to the telegraph office right away and pay the charges and send it.

Thereupon the paper marked Plaintiff's Exhibit No. 1 for identification was introduced and admitted in evidence, and which is in words and figures as follows, to-wit:

"November 30, 1917.

J. A. CZIZEK,
5767 Shafter Avenue,
Oakland, Calif.

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait (here) year and chances of liquidation says if fails to get two-thirds stock liquidation will follow will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

"T. J. JONES."

WITNESS: Mr. Miller wrote the word "answer" in pen at the end there on the telegram, and I struck out the word "here" and wrote "year". When I left the bank and took the two copies of the telegram up to my office, my son Felix Jones and I think his brother Tom were present in my office. I then gave the telegram to Felix and I think I put the other copy in the safe. I gave directions to my son Felix to take the telegram immediately to the telegraph office. First I told him to go to the safe and take sufficient money and to go to the telegraph office and send that telegram and prepay the charges. He then left with the telegram. My recollection is that

the 30th of November of that year was a Friday and that this was a Friday evening, and the next day Mr. Miller came up to the office and wanted to know if I had heard from Czizek and I told him no. He said he was very anxious to get this stock and any other stock that I had, and said we could go ahead and close the deal, and that if I didn't have the Czizek stock that could be put in later. He seemed to have the impression that I had the Czizek stock—and as to the probability of the message being delivered. I said, "Well, the company would have until noon to deliver the message and Czizek might not be in the house at the time, and we would leave it go until evening." Czizek's address that I got at the bank is the address that is on that telegram, in the city of Oakland, California. Continuing my conversation with Mr. Miller I said that the next day being Sunday intervening, it wouldn't really make very much difference, so on Sunday I requested Felix to go to the telegraph office and see if he could get any information with reference to that telegram, and he came back and reported that—

MR. MORROW: We object to what he reported.

THE COURT: Sustained.

MR. JOHNSON: That was merely, your Honor, not to suggest that the telegraph company made any such statements as that, but merely to show the connection of his conversation with Miller, explanatory, so that we could understand Miller's subsequent actions. I expect to offer other evidence as to what he told him.

THE COURT: Very well. With that understanding.

WITNESS: He reported to me that the telegraph office said the message had been delivered to Czizek at Oakland, California. That was what I told Mr. Miller. Then on Monday Mr. Miller came up and he wanted to know if I had heard anything from Czizek and I told him no. That would be Monday. That would be the 3rd of December. And he wanted to know if he was in town, and I said I had stopped at the Idanha and he wasn't there, and I went and called up the Idanha and they said he wasn't there. Miller said he thought he was on his way to Boise. I said I thought he was, too, having received that telegram and not having answered, that I thought he was on the way and had the stock with him. Then Miller said to me—

MR. MORROW: We object to further testimony as to what Mr. Miller may have said, on the ground that it is hearsay and incompetent. The evidence that has already gone in I think is merely explanatory, but anything further that was said must necessarily relate to matters arising after the telegram was sent, and, if relevant at all, would have to bear upon the issue of Miller's readiness and willingness to buy that stock at that time, on the 3rd day of December.

MR. JOHNSON: This is merely explanatory, if the Court please.

THE COURT: I think I shall let it go in. You may continue.

WITNESS: Miller said to me, "You transfer your stock"—my individual stock. That is the first time that I recall now that my individual stock came up. "I am going down to Salt Lake, and I will try and see Czizek, and if I do I will close with him there; and if I don't see him and he comes through, the money is in the bank. I have given instructions to the bank to turn the money over." The money could have been put, according to Miller's statement, could have been put to my credit or Czizek's. Miller was willing at any time to pay the money if I would agree to turn over the stock or see that it was turned over. I told him at that time that I wouldn't deliver my stock, that it was selling for less than par, and I wouldn't break my word to Czizek for $1350.00, and he represented that at any time that Czizek and I would take the money and the stock would be delivered, that it would be paid for, that the bank would pay for it, all I had to do was to take it to the bank, or, if I preferred, the money would be placed to credit as I would designate. At that time I told Miller that I wouldn't sell my stock until Czizek's and mine went together. Yes, my office is in the same building as the bank. Later in the day Mr. Miller called me up and asked me to come down to the bank, and I think I went down, and Miller asked me if I had the stock with me, and I told him no; and we had another conversation about the stock, and he came up to the office, and he said that I was interfering with his plans by not closing the deal, and to that extent was hurting the bank, and that there couldn't be any

possible injury to Czizek or anybody else by closing the deal; and that he was going out of town, and he wanted the matter closed. I again refused to turn the stock over, but after he went out, in talking the matter over with Felix, I took my stock and went down to the bank. I said to Miller, "I have my stock." He said, "I am going out of the bank; put it on my table. When I come in I will give you a check or put the money to your credit." I went over to the table and put my stock on his table, unendorsed, and went down in the afternoon, and Miller was in the bank. And I said, "Miller, I left my stock on your table unendorsed." He said, "I wouldn't give you your check until it was endorsed." I said, "Neither would I endorse the stock until it was paid for; this is a business transaction. If you want the stock give me your check and I will endorse it." He wrote a check for $1350.00, and I took the check over to the cashier and had it cashed and entered in my bank book, and went back and endorsed the stock.

I next saw the plaintiff, I think, about the middle of February, 1918. I met him at the corner of Ninth and Main streets in Boise, Idaho. I had a conversation with him there. After we had shook hands I said to him, "Why in hell didn't you answer my telegram?" He said, "What telegram?" I said, "That telegram that I sent you to Oakland. I had your stock sold." He said, "I never got the message." I said, "The office reported that it was delivered to you at Oakland, California." He said, "Did the office say that?" I said, "Yes." He said, "Let's go

up to the office." We went over to my office, and I gave him, Czizek, this triplicate of the telegram that I had in my office. Yes, I am sure about giving him this triplicate of the telegram I had in my office. And we went up to the telegraph office together, and Mr. Czizek asked for Mr. Hackett. Mr. Hackett came up to the counter. Mr. Hackett was supposed to be the manager of the Western Union. He had been there a long time. Czizek read this telegram to Hackett, and Hackett asked Czizek to let him see it, and Czizek handed it to him, and Hackett turned to go away with the telegram in his hand, and I objected, and he handed it back to Czizek and said he would look it up and let us know later. And Czizek and I left the telegraph office together. Either that day or the next day or the following day, within a day or two, I received a letter from Mr. Hackett and in that letter was enclosed a check or a draft for I think sixty-five cents; anyway it was the amount of money that Felix had paid for sending the message.

MR. JOHNSON: I will ask that this paper be marked as Plaintiff's Exhibit No. 2 for identification.

Said paper was thereupon marked Plaintiff's Exhibit No. 2.

WITNESS: This paper marked Plaintiff's Exhibit No. 2 for identification is the letter that I received from Mr. Hackett enclosing check. I am not sure whether it was a check or a draft for sixty-five cents. Yes, that is the original letter.

Thereupon the letter was offered and received in

evidence, and marked Plaintiff's Exhibit No. 2, and is in words and figures as follows:

(Letterhead of Western Union Telegraph Co.)

"Boise, Idaho, Feb. 14, 1918.

"T. J. Jones, Atty at Law,

"Boise, Idaho.

"Dear Sir:—

"I find on investigation that the message you filed with us on Nov. 30th, 1917, addressed to J. A. Czizek, Oakland, failed in transmission.

"The employees concerned in the failure will be vigorously disciplined.

"I am sure it is unnecessary for me to say the unfortunate occurrence and any inconvenience it may have caused are very much regretted, and, in accordance with our custom in such cases, I enclose herewith the amount paid as tolls.

"Yours truly,

"G. H. HACKETT, Manager."

WITNESS: Either the day that I received the letter and check or the next day or maybe the day after that, I wrote Mr. Hackett a letter returning the check or draft, whichever it was. I kept a duplicate of that letter.

Thereupon, Plaintiff's Exhibit No. 3 was offered and introduced in evidence, and is in words and figures, following:

"JONES & JONES
Lawyers
BOISE, IDAHO,

"Feb. 18, 1918.

"The Western Union Telegraph Co.,
"G. H. Hackett, Manager.
"South 8th St., Boise, Idaho.

"Gentlemen:—

"Your letter of Feb. 14, 1918, to hand, containing your check No. 62 dated Boise, Idaho, Feb. 14, 1918, on First National Bank of Idaho, Boise, Idaho, payable to the order of T. J. Jones in the sum of $0.65.

"Toll paid on message filed in your Boise office Nov. 30, 1917, addressed to J. C. Czizek, Oakland, Cal., which you say failed in transmission.

"An acceptance of the check on my part might be construed as a settlement of the matter. I therefore return check to you.

"Yours truly,

"T. J. JONES."

WITNESS: After I had replied to Mr. Hackett's letter returning the check or draft, whichever it was, Mr. Hackett came up to my office and he said he was General Manager of the Company at that time. He said, "Mr. Jones, I came up to talk to you about the Czizek telegram that failed in transmission, and I would like to ask you some questions." I said, "All right." He said, "It is unfortunate that it didn't go through, and the company will settle it.

There is no question about their liability," or words to that effect.

MR. MORROW: We move to strike out the last statement about liability, because it is a conclusion.

MR. JOHNSON: It isn't binding on the company—we realize that, your Honor. It is merely explanatory.

THE COURT: Very well.

WITNESS: He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock—

THE COURT: Well, now, apparently this isn't very material, do you think?

MR. JOHNSON: It is only material as to what follows, your Honor, with reference to some further questions that he asked him. And then it has a materiality in this way, in connection with some further facts that I intended to prove, in an attempt to show a waiver by the company of the sixty-day provision set up as a defense, this among various other circumstances which I will argue to the Court constituted the waiver. This is just one circumstance connected with others, and while possibly of itself it would be subject to the objection, I thought that after the testimony was in the Court could give it such legal effect as he thought necessary, as long as this case wasn't being tried before a jury, and I would introduce it.

MR. MORROW: We wish to make the further objection that it is apparently—it didn't develop until this last statement—that it is an offer or some

negotiations concerning a compromise of the claim, and I don't think that is admissible.

MR. JOHNSON: Well, it isn't seeking to establish that the company has admitted its liability.

THE COURT: I would be quite clear that it isn't proper evidence at the present time if you were trying the case before a jury. Isn't it more properly rebuttal if you are offering it only for the purpose suggested, a waiver of that defense?

MR. JOHNSON: Possibly it would be, Your Honor, more in the nature of rebuttal, but if that particular objection isn't raised, I would like to have Mr. Jones testify at this time, because his health is very poor and he has to leave here in a very short time.

MR. MORROW: We wouldn't care to make the objection, in view of that situation, Your Honor, on the ground that it is properly rebuttal, but I want to call attention to the further fact that the contract provides that no employe is authorized to vary the foregoing provisions, including the sixty-day provision, so the only possible competency of this evidence would be on the ground of this question of waiver, and I think that is sufficiently clear upon that provision, that Mr. Hackett couldn't waive that by any statement he might make.

MR. JOHNSON: I realize that there is perhaps a question of law there, which perhaps we would better take up in the argument of the case. There are some authorities that hold that a manager can waive those provisions, and there are numerous

other matters in connection with the waiver that I think should perhaps all be taken together, and the Court can give them the legal effect necessary.

THE COURT: Well, perhaps we can get at it more directly and more briefly in that way. You may proceed.

MR. JOHNSON: Q. Go ahead.

WITNESS: What was the last question?

MR. MORROW: Do I understand the objection is overruled?

THE COURT: No. The testimony will be admitted, subject to the objection.

The last question was read to the witness.

WITNESS: He said, "Isn't that correct?" I said, "Yes." He said, "The amount that Czizek would be entitled to would be the difference between the value of the stock and the amount Miller offered. Isn't that correct?" I said, "Yes." He asked me what the stock was worth and I referred him to Mr. Streeter, the cashier. He said, "I would like for you (meaning me) to fix the value, as I think you would be fair, and I have taken this matter up with the company." He said, "As I understand it, the banks have guaranteed the depositors, and there can't be any liability attach to the stockholders." I said that statement was only partially correct, that instead of the stock being worth something, the liability might attach to the stockholders, as the banks had only guaranteed the depositors, and hadn't guaranteed any of the indebtedness of the bank, if there was any. Well, I think that that was all that was

said at that time that related particularly to this matter. If I had any further conversation with him after that time, I do not recall.

CROSS EXAMINATION, by Mr. Morrow:

WITNESS: The date on which I sold my stock and got this check was the 4th of December, 1917. No, this telegram was not written in my office at all. It was written down at the bank, in triplicate. We used that blank of the company, the same as that one that was introduced in evidence, for all three of the telegrams. All three of them were on the same form as Plaintiff's Exhibit No. 1. I think they were on the same form. I know the wording was the same in all of them.

MR. MORROW: Will you mark that as Defendant's Exhibit A?

A certain paper was thereupon marked Defendant's Exhibit A, which was read by Mr. Morrow to the witness, and is in words and figures the same as Plaintiff's Exhibit No. 1.

WITNESS: Yes, these two are part of the three triplicates. These two are two of the three triplicates.

(Witness excused.)

J. A. Czizek, the plaintiff, produced as a witness on his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION, by Mr. Johnson:

WITNESS: My name is J. A. Czizek, my age 55, my residence Oakland, California. I am acquainted with a bank known as the Idaho National

Bank. I am a stockholder in that bank. I own fifty shares of stock. The par value of that stock is $100. I owned fifty shares of stock in the month of November, 1917. I was acquainted at that time with one David Miller, and also with T. J. Jones, the witness that just testified. I came from my operations in central Idaho to Boise along about the middle of November, I would judge, in the year 1917. Prior to this I had received several communications from Mr. Miller about things generally with reference to bank, etc., and the question of purchasing the stock or entering into a merger with the Pacific National Bank that he talked to me about, was discussed. I told him I didn't want to enter into any merger, that I wanted to sell my stock. I had had some bad bank stock experience, and I didn't want to have the stock. We discussed the value of it pro and con for a little while and didn't arrive at anything, because I learned that he was not ready just then to buy it, but he told me he was going away and that he would be back at a certain time, or near a certain time, when he would be ready to negotiate with me further, and we would have no trouble about agreeing on the price, and he would buy my stock. Yes, I had a conversation after that with Mr. T. J. Jones with reference to this matter. After Miller and I had our talk, I went to Mr. Jones, who was also a stockholder, that I knew, and we had talked about this matter more or less at different times, and told him what Mr. Miller told me, that he would be back with the money to buy our stock, and this merger that

he talked of, and that I wanted him to negotiate with him for me, that we would sell together. He wished to buy both our holdings together. I afterwards told Mr. Miller after talking with Mr. Jones, that Mr. Jones could negotiate for me, and I left for California. I left Boise within a day or two after that. My address was always in the Idaho National Bank. My Oakland address at that time was 5767 Shafter Avenue, Oakland. I was at my home in Oakland continuously between November 30, 1917, until about shortly after the first of February, excepting little drives out in the country. I did not receive any telegram from Mr. T. J. Jones. I received nothing with reference to the bank stock.

Q. If you had received that telegram, Plaintiff's Exhibit No. 1, what would have been your attitude with reference to your stock?

MR. MORROW: If the Court please, we object to evidence as to what his attitude would have been, on the ground that it is incompetent, irrelevant, and immaterial. I would like to state that objection a little more in detail, if the Court please. And particularly for the following reasons: Because the witness is asked his present opinion on a past condition of things that never existed, but is now summoned before his mind as conjecture. He is asking the present opinion of the witness as to what he would or would not have done in a stated contingency. It is contrary to public policy, as tending to encourage corrupt testimony, and has a vicious tendency. The allegations of the complaint show

that plaintiff did not suffer any actual loss other than a possible opportunity, for which a recovery is precluded under the law. The telegram shows that the sender was asking information or advice as to whether or not he should sell his own stock The telegram is in evidence, and the Court can determine that. The complaint shows that there was no obligation out of which any loss could have resulted. The damages sought are too uncertain, contingent, and remote, to render any testimony in relation thereto competent. The sale of said stock depended upon the independent will of the plaintiff, and that was a contingency that precludes recovery and renders the testimony incompetent. And the sale of the stock also depended on the independent will and ability of the party referred to, David Miller, to purchase the stock, and that also is a contingency which precludes recovery and renders the testimony incompetent. In other words, Your Honor, we are objecting to any evidence as to what this witness' attitude would have been if he had received this telegram, because he has just testified that he didn't receive it. And if the Court cares to go into this matter at this time we have the authorities I think that amply sustain our position.

THE COURT: I think I shall receive the testimony subject to the objection. It may be rather a nice question as to whether it is competent. You may proceed.

MR. JOHNSON: Go ahead, Mr. Czizek.

WITNESS: The question, please.

(Question read.)

A. I would have sold it. I was seeking to sell it.

Q. What would your reply have been to the telegram if you had received it and answered it?

A. To accept it.

MR. MORROW: May it be understood that this same objection goes to all this class of testimony?

THE COURT: Yes.

A. I should have wired a reply of acceptance.

The Court afterwards sustained defendant's objection to the above testimony, and held and decided that the evidence was insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram, and was insufficient to show that plaintiff would have accepted the offer. To which ruling plaintiff was allowed an exception by the Court.

WITNESS: After that time I returned to Boise about the 13th or 14th of February, 1918. I had not seen Mr. Miller in the meantime. I saw Mr. Jones after my return to Boise. I am not certain whether it was the same day I arrived or the following day, I met Mr. Jones on the street. He immediately wanted to know why I didn't reply to a message he sent me about the bank stock. I told him I hadn't received any message about the bank stock. Well, he had sent me a message and everything was all fixed. And among other things, he invited me to his office and showed me a copy of a message he had sent, or a message that was supposed to have been sent to me. We discussed the thing a little bit,

and I suggested that we go down and see Mr. Hackett. We went down to the telegraph office and I called for Mr. Hackett personally and discussed the matter with him. I was very well acquainted with Mr. Hackett for twenty years or more. Well, Mr. Hackett felt rather bad about this, and I was a little bit angry. Well, that was about all there was to it. We left the office and he said that he would look it up and find out who was to blame. Yes, he handed me a telegram—returned me one. I don't know whether it was the original or whether it was a copy, I am not certain. But he promised to take the matter up and I let it go at that, and he did later on. I think I gave the telegram that he handed me to Mr. Jones for safekeeping, or something. We took it with us. Yes, that was the telegram that was introduced in evidence, marked Plaintiff's Exhibit No. 1. That is the only one I know anything about, supposed to be a copy of the original. I afterwards gave it to my attorney in this suit. No, I am not clear on the point at this time whether it is the one Mr. Jones had or whether it was the original that Mr. Hackett had. The next occurrence that I recall with reference to this dispatch was, I was called into Mr. Jones' office and he showed me a letter that he had received from Mr. Hackett. That was a day or two later. I don't know whether it was the following day, but it was shortly after I had talked to Mr. Hackett. He said, "I have got a sixty-five cent check or draft here." And we decided we shouldn't accept it, to send that back. Yes, that was the letter

that was introduced, marked Plaintiff's Exhibit No. 2, the letter from Mr. Hackett to Mr. Jones. I don't think Mr. Miller was in Boise at that time. No, I am quite satisfied he wasn't, because I would have seen him. Yes, I received a communication from the defendant at that time—an agent, or somebody in Salt Lake, an attorney or somebody from Salt Lake I think it was. I addressed a communication to the defendant company, and I kept a copy of it. This was, I think, at the suggestion of Mr. Hackett, and set forth the case as well as I could to this attorney, I think it was, in Salt Lake.

A certain document was thereupon marked Plaintiff's Exhibit No. 4 for identification.

WITNESS: This is the original letter I addressed to the agent or the manager at Boise, for the attention of Mr. Hackett of the Western Union Company. That was done at the suggestion of Mr. Hackett, and I think he sent it on, at least I got a reply from Salt Lake City.

Thereupon, the paper marked Plaintiff's Exhibit No. 4 for identification was offered in evidence.

MR. MORROW: We would object to this, for any other purpose than that of showing that a claim in writing was made to the company on this date, and for the reason that a number of statements therein are self-serving, and further the general objection to the testimony relating to what the plaintiff would have done if he had received the telegram, the same objection that we made a few minutes ago to other testimony along that line.

THE COURT: Well, it will be received only for the purpose suggested.

MR. JOHNSON: Yes; it is only for the purpose of showing, Your Honor, that a claim in writing was made on that date.

MR. MORROW: Well, it is competent for that.

MR. JOHNSON: I will read it to the Court.

THE COURT: That is unnecessary. If you will just let me have it.

MR. JOHNSON: All right.

Plaintiff's Exhibit No. 4 was thereupon admitted in evidence, and is in words and figures as follows:

"Boise, Idaho, June 18, 1918.

"Western Union Telegraph Company,

"Boise, Idaho.

(Attention Mr. Hackett, Manager.)

"Gentlemen:

"After complete investigation, I find that on the 30th day of November, 1917, a telegram was addressed to me, properly directed to my address, 5767 Shafter Avenue, Oakland, California.

"The letter advised me of the opportunity to sell fifty (50) shares of my stock in the Idaho National Bank at a price of Ninety Dollars a share or a total of Four Thousand Five Hundred Dollars.

"I was extremely desirous of selling this stock and this offer would have been immediately accepted if this telegram had been delivered to me.

"It was sent to me by my associate and agent,

Mr. T. J. Jones of Boise, Idaho.

"After being delivered to your Company the price of the telegram was paid by Mr. Jones for me, and instead of the telegram being sent it was pigeon holed in Boise, although on December 2, 1917, there being no response to Mr. Jones' inquiry, he sent his son to the telegraph office to ascertain whether the message had been sent, and Mr. Jones was informed by one of the employes of the office that the message had been delivered.

"Again, on December 3, 1917, Mr. Jones' son, Felix T. Jones, went to the office in Boise, Idaho, and inquired about the delivery of the message, and your employee specifically replied that the message had been sent and delivered to you on December 1, 1917.

"Whereupon Mr. Jones decided that I did not care to sell my stock, and the opportunity for selling it passed.

"I was not aware of the transmission of this telegram until my return to Boise, about the middle of February, 1918, at which time, in company with Mr. Jones and his son, we went to the Western Union office and there found that the message had never been sent to me, but was still in the office. Whereupon Mr. Hackett delivered to me the original message, which I now have in my possession.

"He also attempted to return the toll, and the next day sent your check No. 62 in the sum

of Sixty-five cents. This check was refused and Mr. Jones returned it saying that he did not care in any way to waive any claims which might arise for damages.

"I now demand, by reason of your negligence, the sum of $4500.00, with interest thereon at the rate of seven per cent per annum from and after the 9th day of December, 1917. Unless this matter can be settled and adjusted I will be obliged to seek my remedy in the Court.

"Please address me c/o Overland National Bank, Boise, Idaho.

"Yours very truly,

(Signed) "J. A. CZIZEK."

WITNESS: Yes, I received a reply to that communication.

Thereupon an envelope was marked Plaintiff's Exhibit No. 5 for identification, and a letter was marked Plaintiff's Exhibit No. 6 for identification.

WITNESS: No. 5 is an envelope addressed to me from Salt Lake City, and contains this letter, Exhibit No. 6, which seems to be a reply to my letter and is signed by U. G. Life, District Commercial Superintendent.

Thereupon, Plaintiff's Exhibits Nos. 5 and 6 for identification were offered in evidence.

MR. MORROW: I don't think it is material, but there is no particular objection. The objection rather goes to the weight of it.

Thereupon, these exhibits were admitted in evidence and were marked Plaintiff's Exhibits Nos. 5

and 6 respectively. Plaintiff's Exhibit No. 5 is an envelope upon which is printed, in the upper left hand corner, the return card of the Western Union Telegraph Company, Salt Lake City, and the name Mr. J. A. Czizek, Care Overland Natl. Bank, Boise, Idaho, is printed on the envelope, and a pencil line is drawn through the words Care Overland Natl. Bank, Boise, Idaho, and the address, Warren, Idaho, in pencil written in place thereof. Plaintiff's Exhibit No. 6 is in words and figures following, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY
"Mountain Division"

"U. G. Life,
"District Commercial Superintendent.
"Salt Lake City Utah, July 2, 1918.

"Mr. J. A. Czizek,
c/o Overland National Bank,
"Boise, Idaho.

"Dear Sir:

"Asknowledging receipt your favor June 18 addressed this Company, Boise, Ida., making claim against the Company for $4500.00 alleged loss sustained by alleged failure in transmission message filed Nov. 30, 1917 addressed to yourself at Oakland, Cal., signed T. J. Jones; beg to advise this matter has been taken under immediate investigation upon conclusion of which you will be communicated with further.

"However, more than 60 days having elapsed since date claim message was filed, our investigation will be conducted without prejudice to

the situation created by your failure to bring matter to our attention at an earlier date.

"Yours truly,

(Signed) "U. G. LIFE, Dist. Com'l Supt."

MR. JOHNSON: Here is a letter that perhaps should have come before the other two. I will ask that this letter be marked as Plaintiff's Exhibit 7.

Said letter was thereupon marked Plaintiff's Exhibit No. 7.

WITNESS: This paper marked Plaintiff's Exhibit No. 7 is a letter from Mr. Hackett that prompted the writing of that letter there, Plaintiff's Exhibit 4. That was received prior to my writing that letter, and was received by me.

Thereupon Plaintiff's Exhibit No. 7 was offered and received in evidence without objection, and is in words and figures following, to-wit:

"THE WESTERN UNION TELEGRAPH COMPANY

"Incorporated

"Manager's Office, Boise, Ida., June 19, 1918.

"J. A. Czizek,

"Boise, Idaho.

"Dear Sir:

"Your favor 18th instant received and I have forwarded same to our Company for consideration. Am I to understand that the stock has no value at present? Was there not some value to the stock when you first discovered the message had not been sent about the middle of February when you returned to Boise?

"Yours truly,

(Signed) "G. H. HACKETT, Manager."

The Court held that the foregoing testimony relating to the statement and communications of Mr. Hackett, Manager, to Mr. T. J. Jones and to plaintiff, and the letter from Mr. Life, district superintendent, did not constitute a waiver by defendant of the clause on the telegraph blank which provides that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the telegram is filed with the company for transmission, to which ruling of the Court plaintiff was duly allowed an exception.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: On November 30th, 1917, about that time, this bank stock was in Oakland. It was in the Bank of Italy. It was there with other collateral at the time, for a loan. No, not the Bank of Italy in San Franciso, in Oakland. Well, I beg your pardon, at that time that was the Security Bank. It is now a branch of the Bank of Italy, taken over by the Bank of Italy since. It was then known as the Security Bank.

RE-DIRECT EXAMINATION By Mr. Johnson:

WITNESS: Yes, sir, at that time this bank stock that I owned in the Idaho National was available to me to sell. I was in a position to deliver the stock at any time.

Yes, I could have obtained it from the bank.

RE-CROSS EXAMINATION By Mr. Morrow:

WITNESS: Yes, I know what the time for a letter between Oakland and Boise is. The ordinary

time of sending a letter. A letter leaving Oakland to Boise should arrive here in 48 hours without any trouble, probably less. The train leaves Oakland at ten o'clock in the morning and you are here the following morning by four o'clock, the second morning.

The Court thereafter held that this evidence was insufficient to show that plaintiff could have gotten his stock which was held in a bank in Oakland, as collateral, to Boise in time to have accepted Miller's offer, even if the telegram had been sent and delivered, to which ruling of the Court plaintiff was duly allowed an exception.

(Witness excused.)

Felix T. Jones, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is Felix T. Jones, my age 27, my residence Boise City, Idaho, my occupation is attorney. I am at present holding the position of police judge with the City. I am a son of T. J. Jones, and was his former law partner. I am acquainted with one David Miller. I was present at a conversation in the latter part of November, 1917, at the Idaho National Bank, at which my father and Mr. Miller were present. At the time, they were speaking of the stock, speaking of 65 shares of stock, and at that time Mr. Miller made an offer of $85.00 per share for the stock, which was refused. Mr. Miller made the statement that he had bought other stock at a cheaper price, and that was about the substance

of the conversation. His offer was refused. I was in my father's office on or about the 30th of November, 1917, in the afternoon or towards evening. I was up there alone, and my father came in presently with two telegrams, that is, it was two messages, two duplicate messages, and requested that I take it over and send it to J. A. Czizek. He told me to take the money out of the safe and send the message to Czizek.

(Witness handed papers marked Plaintiff's Exhibit No. 1.)

WITNESS: That was one of the messages. I can't say whether that is the original or one of the duplicates. It is one of the telegrams. I took it down to the telegraph office and gave it to the operator. I asked him what the charges would be, and he stated that the charge was sixty-five cents. I told him to send the message to J. A. Czizek at Oakland. I prepaid it. The message was stamped, or I think the first one I gave the message to was May Eagan—of that I am not positive—I think I gave the message to May Eagan. Her name is now May Russell. She was the girl behind the desk. And she was the person I gave the message to. I left it with her, prepaid the charges, and left. I then came back to the office. After leaving the telegram there I came back to our office in the Yates Building. At the request of my father, I went to the telegraph office, I believe on the first of December, which I think was a Saturday, and asked if there was a message there for Jones. She said no, and then I asked her if they

had sent a telegram, to look through and see if a telegram had been sent to J. A. Czizek at Oakland.

MR. MORROW: Just a moment. We object to any further testimony from this witness regarding the conversation that he had with the employes of the company, for the reason that there is an attempt apparently in the complaint to lay a basis for an action of deceit. In paragraphs 7 and 8 it is alleged in substance that the present witness, at the request of his father, made several inquiries at the office as to whether the message had been sent, and was informed that the message had been sent, and that the said T. J. Jones relied upon and believed those statement. Now if those allegations are material for any purpose it would be as laying a foundation for an action on the ground of deceit, and the fundamentals of that action are not alleged, particularly there is no allegation of any intent to deceive, and there is no allegation that the employe making any representations concerning that telegram can or ought to have known the facts, and there is no showing of any authority by any employe to make representations concerning the delivery of a telegram, unless in case the sender asks for a report of delivery, which was not done in this case. In that event, under the rules of the company, the receiving office would wire back that it was delivered. But if counsel is seeking to put this in for the purpose of showing the essentials of an action for deceit we think his complaint is radically defective, because he hasn't pleaded it on that theory, and he hasn't pleaded either that there

was any intent to deceive, or that there was any knowledge of the falsity of any representation that has been made, and I don't think it is necessary to cite authority upon the point that there is no liability for mere innocent misrepresentations.

MR. JOHNSON: If Your Honor please, it goes to the question of the negligence of the company, it seems to me.

THE COURT: No. The negligence is in not delivering the message.

MR. JOHNSON: Well, also in the employes of the company informing him that it had been delivered, so as not to make it necessary, or to show that the plaintiff was not negligent, that is, Mr. Jones, in not communicating further with him.

THE COURT: Well, for that purpose it may go in.

(Question read.)

WITNESS: She looked through some papers and files, and said the telegram had been sent. Well, Sunday came on and it was my opinion, if I remember right—it seems that the next day was Sunday, and on Sunday I went to the telegraph office again. I am positive it was Sunday—this being the first—the 30th was a Friday—Saturday was the first—the second was a Sunday. I guess I went on the third, a Monday, to the telegraph office and inquired if the telegram had been sent to J. A. Czizek, at Oakland, at which they looked through some more files, and the person behind the desk replied that J. A. Czizek had received the telegram, and with that I walked

out. I was present at my father's office after that time, when a conversation took place between my father and David Miller with reference to this stock. Miller came up to the office and asked if we had heard from Czizek. I think that was about ten or ten-thirty in the morning, I think about that time. That would be the fourth. And asked if we had heard from Czizek, to which we replied no, and then he stated that he doubted, that he considered, that he thought we were holding the Czizek stock up, in other words, that he thought we had the 65 shares of stock at that time, and we told him no, and then he questioned us as to whether we had sent the message or not, and that was about all the conversation.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: If Czizek answered the telegram, I suppose Czizek would have sent the telegram to T. J. Jones. I don't remember whether the clerk made any inquiry or any notation upon the telegram.

(Defendant's Exhibit A handed to witness.)

WITNESS: The telegram which I hold in my hand at the present time, I believe is the one that I gave to the operator, because these letters here, "454 Yates B." and the "408-W", that is not my writing. It is not my father's writing. I can't say in this particular message—I don't remember whether the clerk asked about our telephone number, but it is customary when you take a message there as a rule, that they usually put your address, and put a scroll around it. I don't think it makes any difference whether you ask for an answer or not. I am not

a customer in the office to any great extent, but I don't think that makes any difference. Now, as to this conversation that I had at the telegraph office after the telegram had been sent—there was a conversation on a Saturday. The first conversation was on the first, almost twenty-four hours had elasped. Then the second conversation—yes, the telegram was sent on the 30th. I went there first on the 30th and then again on the first, which was almost twenty-four hours after I had taken the telegram down and given it to them to be sent to Czizek. Yes, that would be some time Saturday afternoon. The exact wording of the first statement that was made to me was that the message had been sent to Czizek. Yes, that the message had been sent to Czizek. The way the question was worded, there is no question in my mind, the way they put it, that they told me, that they gave me to understand, that Czizek had received the telegram. As near as I can recall the exact language, that was the exact language, that J. A. Czizek of Oakland had received the telegram. That is the exact language as near as I can recall. Yes, I paid the charge of sixty-five cents.

(Witness excused.)

The Court took a recess until 2 o'clock P. M.

2 P. M., Saturday, February 28, 1920.

By permission of the Court, J. A. Czizek, the plaintiff, was recalled for further examination and testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: Yes, sir, I stated that I am still the

owner of the fifty shares of bank stock of the Idaho National Bank referred to in the complaint. Well, with reference to disposing of the stock after the middle of February, 1917, when I first learned that this telegram had been sent, I heard a great deal about the plan to merge, and the value of the stock to me seemed to be dependent on selling it, and there was at that time—Mr. Miller wasn't here, and I heard it had fallen through, that his merger plan had fallen through, or whatever they had in view. I don't know as to the details of that, but Mr. Jones and I discussed it a great deal, and he seemed to think there was nothing more to be done about that merger, and I didn't know where there was a market for it. In fact, I didn't attempt to sell it to anyone else at that time. Well, I didn't know anything of its value other than on one or two occasions I asked Mr. Streeter, who was the cashier, what he thought it was worth. I will venture the statement that I asked him two or three times, but he wouldn't fix it. In fact, his statements to me were very discouraging as to its value. The bank ceased to operate as a bank. Some time following that time I went to the mine, and I received, I think, a notice to attend a meeting, for the purpose of liquidating, or something of that kind. I just can't recall what that notice was or how it read, but I didn't pay much attention to it; I was busy, but later I learned that they were liquidating, and it was in the Overland National. After that time I knew of no market for the stock. I doubt whether there was any.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: No, I don't think I attempted to sell the stock to anyone else after I came back in February. Mr. Miller I don't think was there. I didn't see him until June of that year. I went home, and he telegraphed me at Oakland, and I met him at Salt Lake by appointment on entirely another matter. In fact the matter pertained to the purchase of mining interests that he had. I came here to Boise with him for the purpose of consummating that deal. I did not make any further attempt to sell the stock. In fact, I have never made any attempt to sell the stock, prior to Mr. Miller, and told Mr. Fletcher prior to his death that I would like to dispose of it when I left Idaho.

RE-DIRECT EXAMINATION By Mr. Johnson:

WITNESS: No, I know nothing regarding its value of whether I could have sold it or whether it had any market value. I was rather discouraged on the showing that the books seemed to make, and that Mr. Streeter gave me. I depended on what he told me. Yes, I made some investigations with a view to ascertaining its value. I think I went to Mr. Streeter once or twice. In fact, I used to discuss these things with him every once in a while.

(Witness excused.)

H. L. Streeter, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is H. L. Streeter. I reside

in Boise. I was connected with the Idaho National Bank as cashier from October 1st, 1917, until the present time. I am still acting in that capacity, and as such I have charge of the books and records of the bank. I have with me a portion of the individual ledger that will show the balance of David Miller in the bank at the close of business on November 30th, 1917. Mr. Miller's balance in the Idaho National Bank at the close of business on November 30th, 1917, was $84,003.57. His balance at the close of business on December 1, 1917, was $33,943.11. His balance at the close of business on Monday, December 3rd, 1917, was $30,826.50. And his balance in that bank at the close of business on December 4, 1917, was $30,818.41. I was acquainted with David Miller to a certain extent. He occupied the position of vice president in that bank at that time. Well, yes, he had purchased stock in the bank prior to that time. He was a stockholder in the bank when I went in. I have the stock ledger here, which would show the stock purchased by Mr. Miller in the bank on various dates, and which would show the date that the certificates were transferred and recorded. The record shows that on May 25, 1917, certificate No. 106 was issued for 10 shares. Yes, these are certificates that were issued to David Miller. June 25, certificate No. 107 for 50 shares. On the same date, certificate No. 108 for 50; 109, for 50; 110, for 25; 111, for 25. On October 25, certificate No. 114 for 265 shares. November 30, certificate No. 119, for 265 shares. December 10, certificate No. 121 for

50 shares. That is the last certificate that was issued to Mr. Miller. These were all in 1917. The total capital of the bank was $100,000, and the par value was $100.00. Since the 14th of February, 1917, I don't think there were any transfers of stock in the Idaho National Bank. I don't think there have been any transfers since then. The book doesn't show any that I recall. The Idaho National Bank still has its charter, but there is nothing being done but collecting the assets and paying off the liabilities. It is practically in process of liquidation, and I have charge of those affairs. Well, in my judgment, from my knowledge of the affairs of the bank, the value to the stockholders of the stock in the bank at the present time is purely an estimate, but I doubt if there will be anything left for the stockholders after the liabilities are paid. Well, I should judge that that has been practically the condition of the bank since the middle of February, 1918.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: Yes, I said that on the 10th of December, 1917, certificate No. 121 was issued to Mr. Miller for 50 shares. On December 10th, 1917, it shows that cetificate No. 109 was cancelled for 50 shares. There is no such certificate that shows the transfer of the 15 shares that stood in the name of T. J. Jones, to Mr. Miller. That is, no certificate issued to Mr. Miller for 15 shares. The record shows that certificates held or issued to T. J. Jones were cancelled on December 6th, 1917. Three certificates of five shares each, Nos. 4, 55 and 62 for five shares

each. On December 6, 1917.

The balance in favor of Mr. Miller on the 28th of November, 1917 at the close of business, was $1245.95. Yes, on the 30th of November there were some considerable deposits to Mr. Miller's credit. The items are as follows: an item of $294.40; an item of $130,000.00; an item of $750.00. On the 1st of December, the deposits there to Mr. Miller's credit were, $164.60; $440.00; $20,000.00. And the balance at the close of business on that day, December 1st, was $33,943.11. At the close of business on the 5th of December, Mr. Miller's account shows an overdraft of $20,978.76. The deposits in Mr. Miller's account on the 6th of December, 1917 show $147.10; $3,000.00; $20,000.00, and the balance in his account on the 6th of December at the close of business was $1,212.77. At the first of that day, he had an overdraft of $21,787.23, and the balance at the close of business was $1,212.77. From the 6th to the 10th of December, the maximum balance in his account on any of those days was $952.69. On February 5th he had a balance of $1353.41, and on March 1st he had a balance of $1264.81. Those are the maximum balances during that period.

(Witness excused.)

Nellie M. Wilson, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is Nellie M. Wilson, I reside in Boise, and was formerly an employe of the

Idaho National Bank. I was employed in the capacity of stenographer and bookkeeper. I was connected with the bank ten years and eleven months. I was employed at the bank in November, 1917. I was acquainted with David Miler. He was vice president of the bank. I am acquainted with Mr. T. J. Jones. I was in the bank on or about the 30th of November, 1917, after the banking hours, when Mr. Miller and Mr. Jones were there. I was working on the books one evening when Mr. Jones came back and asked me if I would write a telegram for him, and I told him I would, and I got the blank and sat down at the typewriter. I think that Plaintiff's Exhibit No. 1 is one of the telegrams that I typed. It is the same contents.

Q. What did you do with them after you had typed them?

THE COURT: Do you think that is important, to go over that?

MR. JOHNSON: It was merely leading up to some information that Mr. Miller wanted. I don't know that it is very material, any more than to show that Mr. Miller was very anxious to have the telegram go, and that he afterwards asked her if it was sent, etc., to show that he was personally interested.

THE COURT: All right.

WITNESS: Yes, as I remember, Mr. Jones took the telegrams and went out of the bank with them. Yes, after that I had a talk with Mr. Miller with reference to these telegrams. He came in a little

later and asked me if Mr. Jones had written a telegram to Mr. Czizek, and if it had been sent.

(Witness excused.)

L. C. Flora, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By Mr. Johnson:

WITNESS: My name is L. C. Flora. At the present time I am local manager of the Boise office of the Western Union. I am acquainted with Mr. Life, in Salt Lake. He occupies the position of district commercial superintendent, and has jurisdiction over this territory at Boise. If a claim is presented to me for damages growing out of the sending of telegrams, if it comes within a certain amount, managers investigate the claims and pay them locally, that is for sums, certain sums. If they are more than that, the facts are gathered locally and turned over to the district commercial superintendent, who has greater authority in the matter of the settlement of them. In amounts of $25.00 or over, I send them to the district manager in Salt Lake. These are the instructions that I have from the company.

CROSS EXAMINATION By Mr. Morrow:

WITNESS: Mr. G. H. Hackett was my predecessor as local manager. I can't say positively whether his authority with regard to claims was the same as mine or not, because of the fact that the routine in that respect has been changed slightly, and I believe that it is since 1917. They were approximately the same as my instructions. I have been local manager since November 9, 1918. As best

I can remember, this change of the rules was made some time in 1917. It was simply raising the authority, however, for the office. Yes, for the local office. It was previously, I believe, $10.00. I have been with the Western Union Company about fifteen years.

RE-DIRECT EXAMINATION By Mr. Johnson:

WITNESS: I know the instructions that I had, which were naturally general, and which covered amounts up to $10.00 for offices of this size. No, I wasn't here at the time Mr. Hackett was manager. I have no direct knowledge of what his instructions and authority were other than our rules are universal. Of course, as regards specific authority I don't know. Yes, the rules of all of the local managers throughout the country are practically the same.

(Witness excused.)

Plaintiff rests.

THEREUPON, the following evidence was offered on behalf of defendant:

MR. MORROW: We offer Defendant's Exhibit No. A in evidence, being a telegram identified by two witnesses on cross examination.

Thereupon the paper was admitted in evidence, and is a duplicate verbatim copy of Plaintiff's Exhibit No. 1, with the addition of a pencil notation in the upper right hand corner of MB and 49 pdnl, and pencil notation in the lower right hand corner, 454 Yates B, and .65c 408-W.

Thereupon a certain paper was marked Defend-

ant's Exhibit B and offered in evidence, consisting of a copy of the telegraph blank of defendant, certified by the Secretary of the Interstate Commerce Commission.

MR. JOHNSON: If Your Honor please, we object to this, on the ground that the contract in question in this suit is the one which is introduced in evidence and the one which is binding upon the defendant and the plaintiff, and that is the only one that should be considered in this litigation.

THE COURT: It may go in, subject to the objection:

Said Exhibit B is in words and figures following:

Interstate Commerce Commission

"Washington

"I, GEORGE B. MCGINTY, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of form received on February 20, 1917, from the Western Union Telegraph Company and now on file with the Interstate Commerce Commission.

"In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of March, A. D., 1919.

(Signed) "GEORGE B. McGINTY,

"*Secretary of the Interstate Commerce Commission.*"

WESTERN UNION

Class of Service		Form 1206
Desired	Western Union	Receiver's No.
Fast Day Message	TELEGRAM	M. B. 60
Day Letter		Check
Night Message		49 pdnl.
Night Letter X		Time Filed

Patrons should mark an "X" opposite the class of service desired; OTHERWISE THE TELEGRAM WILL BE TRANSMITTED AS A FAST DAY MESSAGE.

NEWCOMB CARLTON, President.

GEORGE W. E. ATKINS, First Vice-President.

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to.

Boise, Idaho, November 30, 1917.

J. A. CZIZEK,
5767 Shafter Avenue
Oakland, Calif.

Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine Answer.

T. J. JONES.
(454 Yates B)
(.65c) (408-W)

All telegrams taken by this company are subject to the following terms:

To guard against mistakes or delays, the sender

of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this Company as follows:

1. The Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof.

3. The Company is hereby made the agent of

the sender, without liability, to forward this telegram over the lines of any other Company when necessary to reach its destination.

4. Telegrams will be delivered free within one-half mile of the Company's office in towns of 5,000 population or less, and within one mile of such office in other cities or towns. Beyond these limits the Company does not undertake to make delivery, but will, without liability, at the sender's request, as his agent and at his expense, endeavor to contract for him for such delivery at a reasonable price.

5. No responsibility attaches to this Company concerning telegrams until the same are accepted at one of its transmitting offices; and if a telegram is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

6. The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the Company for transmission.

7. *Special terms governing the transmission of messages under the classes of messages enumerated below shall apply to messages in each of such respective classes in addition to all the foregoing terms.*

8. *No employee of the Company is authorized to vary the foregoing.*

THE WESTERN UNION TELEGRAPH COMPANY, Incorporated.

NEWCOMB CARLTON, *President.*

CLASSES OF SERVICE

FAST DAY MESSAGES

A full-rate expedited service.

NIGHT MESSAGES

Accepted up to 2:00 A. M. at reduced rates to be sent during the night and delivered not earlier than the morning of the ensuing business day.

DAY LETTERS

A deferred day service at rates lower than the standard day message rates as follows: One and one-half times the standard Night Letter rate for the transmission of 50 words or less and one-fifth of the initial rate for each additional 10 words or less.

SPECIAL TERMS APPLYING TO DAY LETTERS:

In further consideration of the reduced rate for this special "Day Letter" service, the following special terms in addition to those numerated above are hereby agreed to:

A. Day Letters may be forwarded by the Telegraph Company as a deferred service and the transmission and delivery of such Day Letters is, in all respects, subordinate to the priority of transmission and delivery of regular telegrams.

B. Day Letters shall be written in plain English. Code language is not permissible.

C. This Day Letter may be delivered by the Telegraph Company by telephoning the same to the

addressee, and such delivery shall be a complete discharge of the obligation of the Telegraph Company to deliver.

D. This Day Letter is received subject to the express understanding and agreement that the Company does not undertake that a Day Letter shall be delivered on the day of its date absolutely and at all events; but that the Company's obligation in this respect is subject to the condition that there shall remain sufficient time for the transmission and delivery of such Day Letter on the day of its date during regular office hours, subject to the priority of the transmission of regular telegrams under the conditions named above.

No employee of the Company is authorized to vary the foregoing.

NIGHT LETTERS

Accepted up to 2:00 A. M. for delivery on the morning of the ensuing busines day, at rates still lower than standard night message rates, as follows: The standard day rate for 10 words shall be charged for the transmission of 50 words or less, and one-fifth of such standard day rate for 10 words shall be charged for each additional 10 words or less.

SPECIAL TERMS APPLYING TO NIGHT LETTERS:

In further consideration of the reduced rate for this special "Night Letter" service, the following special terms in addition to those enumerated above are hereby agreed to:

A. Night Letters may at the option of the Telegraph Company be mailed at destination to the ad-

dressees, and the Company shall be deemed to have discharged its obligation in such cases with respect to delivery by mailing such Night Letters at destination, postage prepaid.

B. Night Letters shall be written in plain English. Code language is not permissible.

No employee of the Company is authorized to vary the foregoing.

Thereupon, a certain paper was marked Defendant's Exhibit No. C and offered in evidence, consisting of a certified copy, certified by the Secretary of the Interstate Commerce Commission, of certain rules of the company on file with the Commission, being rules 1, 5, 9 and 29.

MR. JOHNSON: Let the record show that plaintiff objects to it, on the ground that it is not shown that these rules and regulations were brought to the attention of the plaintiff in this suit, and the plaintiff in the suit was not a party to the contract, and did not file the telegram, and is not bound by the rules.

MR. MORROW: I assume, your honor, that the question as to the effect of those rules not having been brought to the plaintiff's attention is one of the matters that will have to be discussed on the final argument. If the Court has any doubt on the matter—

THE COURT: It may go in, subject to the objection.

The Court afterwards overruled this objection and held that provisions on the telegraph blank set up as

defenses were binding upon plaintiff, the addressee of the message, and that T. J. Jones in sending the message was acting as the agent of plaintiff, to which ruling of the Court an exception was allowed to the plaintiff by the Court. Defendant's Exhibit No. C is transmitted as an original exhibit, to the Court of Appeals, by order of the District Court.

L. C. Flora, heretofore duly sworn, upon being recalled on behalf of defendant, testified as follows:

DIRECT EXAMINATION By Mr. Morrow:

WITNESS: In the business of defendant company, we have several different classes of messages. They are the repeated, the unrepeated and the valued messages.

Q. Now state what the method of handling the repeated and unrepeated telegrams is, in your office.

A. An unrepeated telegram—

MR. JOHNSON: I would like to simply interpose an objection there, and object to it as incompetent, irrelevant and immaterial, and not binding upon the plaintiff in this case. It has nothing to do with the issues raised in the pleadings in the case.

MR. MORROW: I may state very briefly, Your Honor—

THE COURT: Well, it is unnecessary. It may go in, subject to the objection. I will hear you on the whole subject later.

The Court afterwards overruled this objection, and held that the provisions of the contract with reference to repeated and valued telegrams were binding upon the plaintiff, the addressee of the mes-

sage. To which ruling of the Court an exception was allowed to plaintiff by the Court.

WITNESS: An unrepeated telegram is accepted over the counter, counted, initialed by the clerk handling, timed by an automatic time clock, and hung on the hook provided for that purpose, to take its turn with other telegrams. While a repeated telegram is given the same handling up to the point that it is given directly to the operator for transmission, and not hung on a hook with the average class of unrepeated messages. A valued telegram is handled likewise. A repeated or valued message is retained with other telegrams and filed away as other telegrams are filed. The handling of it, seeing that handled and repeating back of it, is the only material difference in the handling given. It is first, as I have just said, turned over to the operator for transmission. It is transmitted to the distant point or other relay point, and then repeated back for accuracy to the sending or originating office. The notation made on the face of a repeated telegram is "Repeated back, O.K.", by the operator's initials who has handled the message. That is after it has been sent. Prior to sending, the words "Repeat back", are placed on the face of the telegram. To see whether it has been repeated or not, the sending marks are observed, and the initials by the clerk handling that, to insure that it has been transmitted and properly repeated back.

CROSS EXAMINATION By Mr. Johnson:

WITNESS: The first thing done with an unre-

peated message is, it is first counted, initialed by the clerk, that is, his or her initials put on the face of the telegram to identify who has handled it. That is usually placed in the upper right hand corner. The difference between the handling of an unrepeated message and a repeated message, it is counted first, and the two words, "Repeat back", are written immediately after the check. You will note there in the column check. And the two words "Repeat back" follow that naturally. The first thing that is done with either telegram, is to count them. That is the case with both the repeated and the unrepeated. Then the clerk initials and times it. That is the case with both of them up to that point.

Defendant's Exhibit No. A was handed to the witness.

WITNESS: It has an initial there. You will note the initials "M. B.", perhaps, or "M. Z.", whatever they are, anyway. That would indicate the clerk's initials who handled the message. Yes, that it was received by the clerk and initialed by her. The other writing is forty-nine, paid, N. L., which indicates night letter, as is indicated on the left hand corner.

(Witness excused.)

Defendant rests.

At the conclusion of the testimony, the Court made an order that counsel on both sides submit to the Court and serve on opposing counsel, written briefs covering the point at issue, and this was accordingly done. Counsel for plaintiff in his brief con-

tended that, under the testimony showing that the telegraph message had never been transmitted from the Boise office at all, and no excuse or explanation of such failure having been made by defendant, and the further fact that the sender had been informed by defendant a few days after the message was filed in the Boise office, that it had been sent and delivered to plaintiff, such facts constituted gross negligence on the part of defendant, from which it was not relieved from liability by any of the conditions of the telegraph blank which are pleaded as special defenses in the answer.

The Court, as appears from its written opinion, declined to so find and decide, but held that these facts did not constitute gross negligence but came within the protection of the limitation of liability clauses of the contract. To which ruling plaintiff was allowed an exception by the Court.

The Court also in his said written opinion made certain finding upon certain of the issues, as follows:

(Title of Court and Cause.)

"This suit is brought to recover damages for the failure of the defendant to send the following telegram:

" 'November 30, 1917.

" 'J. A. Czizek,

" '5767 Shafter Avenue,

" 'Oakland, Calif.

" 'Miller advises Idaho National sold to Pacific offers me ninety dollars per share otherwise wait year and chances of liquidation says

if fails to get two thirds stock liquidation will follow Will you take ninety dollars per share for yours I am inclined to accept offer for mine. Answer.

" 'T. J. JONES.'

"It is admitted, or the evidence conclusively shows, that the message, written upon a regular blank form, was filed for transmission in the defendant's office at Boise, Idaho, on November 30th, 1917, the charges being prepaid upon the basis of the established tariffs for ordinary messages; that it was never delivered to the plaintiff and indeed was not transmitted at all; that on February 14th, 1918, for the first time, the plaintiff learned that the message had been filed, and the sender that it had not been delivered; and upon that date together they made inquiry at the defendant's Boise office, whereupon, after investigation, the manager of the office addressed a letter to the sender, dated February 14th, acknowledging the failure to transmit and tendering a return of the charges paid; that there was no written or formal demand for damages by plaintiff until June 18th, 1918, at which time he presented a claim in writing for $4500.00, on the theory that the fifty shares of bank stock owned by him were, and ever since the middle of February, 1918, had been worth that sum, whereas if the telegram had been promptly delivered he could and would have sold the same for $90.00 per share. In response to this demand promise was made to investigate, but without waiving the defense that the claim was barred by reason of the

plaintiff's failure to make demand within the period specified on the telegraph blank."

Plaintiff in his written brief also contended that defendant expressly waived this defense of the 60 day limitation by the actions and correspondence of its officers and agents; and to this ruling that the promise to investigate was made without waiving the defense that the claim was barred by reason of plaintiff's failure to file a formal claim within the 60-day period specified on the blank, plaintiff is hereby allowed an exception on the ground that the finding is not supported by the evidence and is against law.

The Court in his opinion further stated:

"While the point is controverted, I think it also clear that in filing the message the sender was acting for the plaintiff as his agent."

Plaintiff in his written brief also contended that this was an action in tort and not based upon any contract made by the addressee with the company, and that the sender was not acting as plaintiff's agent; and to this ruling that the sender was acting for the plaintiff as his agent, plaintiff is allowed an exception on the ground that it is not supported by the evidence.

The Court in his opinion further found:

"I further find that Miller desired and was able to buy the stock at $90.00 per share, and that the telegram is to be construed as advising plaintiff of an offer of $90, and, had it been delivered, such is the meaning it would have conveyed to him.

"That the form of the telegraph blank here involved, with the indorsements thereon, had been regularly filed with the Interstate Commerce Commission and had been published as required by law.

"That the parties concerned were wholly ignorant of defendant's failure to send or deliver the message until after the expiration of 60 days from the filing of the message.

"That plaintiff had full knowledge on February 14, 1918, but did not make demand until June 18, a period of a little more than four months.

"That the evidence is insufficient to support a finding that plaintiff suffered any damages as a result of his failure to receive the telegram and that he would have embraced the opportunity of which the telegram was intended to advise him, and that he could have or would have delivered the stock which was held in a San Francisco bank as collateral, while Miller was willing and able to keep his offer good."

The plaintiff in his brief contended that the evidence is sufficient to support a finding that plaintiff was damaged as a result of his failure to receive the telegram, and that he would have embraced the opportunity to sell his stock and could have delivered the stock while Miller was willing and able to keep his offer good, and that there is no evidence to the contrary in the record; and the plaintiff is hereby allowed an exception to the contrary finding by the Court, on the ground that such finding of the Court is not supported by the evidence.

The Court also made a general finding in the judgment in favor of defendant and against plaintiff, to which an exception is hereby allowed to plaintiff by the Court, on the ground that the evidence is insufficient to support such finding.

The Court also held as a conclusion of law from the foregoing findings and testimony in the case, that plaintiff was not entitled to recover and he take nothing by the complaint, and that defendant have judgment for its costs of suit; to which ruling of the Court counsel for plaintiff is hereby allowed an exception.

The foregoing constitutes all of the testimony and statement of all of the evidence introduced and offered upon the trial of this cause.

The Court on the 8th day of May, 1920, filed and entered its judgment herein in favor of the defendant and against the plaintiff.

Rule 75 of the rules of this Court provides:

> That within thirty days after the entry of judgment the applicant for a new trial shall serve upon the adverse party and file with the clerk a petition for new trial, stating the papers upon which the application is to be made.

Within the time specified in this rule, to-wit on June 5, 1920, counsel for plaintiff duly served and filed his petition for a new trial herein, which is as follows:

(Title of Court and Cause.)

PETITION FOR NEW TRIAL

To the above named defendant, Western Union

Telegraph Company, and Messrs. Richards & Haga, its attorneys herein, and to the Clerk of the above entitled Court:

You and each of you will please take notice that the above-named plaintiff will petition the above-entitled Court to set aside the judgment and grant a new trial in the above-entitled cause; said petition will be heard before the above-entitled Court or the Judge thereof at the Court Room of said Court in the Federal building at Boise, Idaho, on the 12th day of June, 1920, at ten o'clock A. M., or as soon thereafter as counsel can be heard, and will be based upon the following grounds, to-wit:

FIRST

Insufficiency of the evidence to justify the decision and judgment in the following particulars, to-wit:

(a) That the evidence is insufficient to prove or establish that defendant and its officers and agents did not waive the defense that plaintiff's claim was barred by reason of plaintiff's failure to make demand within the period specified on the telegraph blank.

(b) The evidence is insufficient to prove or establish that in filing the message the sender, T. J. Jones, was acting for the plaintiff as his agent.

(c) The evidence is insufficient to prove or establish that there was nothing unusual on the face of the message to impress defendant's employees that it was of special importance.

(d) The evidence is insufficient to prove or establish that plaintiff did not suffer any damage as a

result of the failure of defendant to transmit the telegram.

(e) The evidence is insufficient to prove or establish that plaintiff would not or might not have accepted the offer contained in the telegram for his bank stock, but on the contrary shows conclusively that he would have accepted such offer.

(f) The evidence is insufficient to prove or establish that plaintiff could not or would not have delivered his bank stock to Miller, by reason of its being held in a bank in San Francisco as collateral, but, on the contrary, the evidence conclusively shows that plaintiff's bank stock was available to him to sell at the time the offer was made and that plaintiff could have obtained it from the bank for that purpose.

(g) The evidence is insufficient to prove or establish that plaintiff was necessarily ignorant of the precise situation and would or might have sought to negotiate for a higher price for his stock, but on the contrary the evidence conclusively shows that he was wholly familiar with the situation and would have at once accepted the offer contained in the message of $90.00 per share.

SECOND

That the said decision and judgment is against law for the following reasons:

(a) That the Court was without jurisdiction to try said cause by reason of the fact that said action could not have been originally brought in said Court, and neither plaintiff nor defendant, at the time said action was commenced, were citizens or residents of

the District of Idaho.

(b) That the findings of fact by the Court, upon which the decision and judgment was based, do not determine all the material issues raised by the pleadings upon which evidence was introduced at the trial.

(c) That it was an error of law for the Court to decide that the actions and letters of the local manager of defendant, Mr. Hackett, and of the district superintendent, Mr. Life, did not constitute a waiver of the defense that plaintiff's claim was barred by the clause requiring the written claim to be presented within 60 days after the telegram is filed with the company for transmission.

(d) That it was an error of law for the Court to decide that this limitation clause was binding upon plaintiff, the addressee of the message.

(e) That it was an error of law for the Court to hold that the period of limitation began to run when plaintiff learned of the failure to transmit the message.

(f) That it was an error of law for the Court to hold that the "specially valued" clause applied where no attempt was made to transmit the message.

(g) That it was an error of law for the Court to hold that the acts of defendant's agents in wholly failing to transmit the message, and in informing the sender that it had been sent and delivered to plaintiff at Oakland, did not constitute gross negligence.

(h) That it was an error of law for the Court

to hold and decide that judgment should be made and entered in favor of defendant.

That said petition will be heard upon the pleading and papers on file and upon "the minutes of the Court," and also the reporter's transcript of his shorthand notes of the trial.

(Signed) RICHARD H. JOHNSON,
Attorney for Plaintiff.

This petition came on regularly for hearing on the 17th day of June, 1920, and was argued by counsel for both sides, and after argument, was on that day overruled by the Court. And thereupon, for the first time, counsel for plaintiff moved the Court for an extension of time of 20 days, or until July 8, 1920, within which to serve and file plaintiff's proposed bill of exceptions, which motion was argued by counsel for both sides. The Court considered the fact of the pendency of the motion for new trial, and the Court allowed plaintiff's motion for an extension of time of 20 days within which to file and serve his proposed bill of exceptions, which order denying a new trial and granting plaintiff's motion for an extension of time is as follows:

(Title of Court and Cause.)

ORDER

This cause coming regularly on for hearing this 17th day of June, 1920, being a day of the regular term at which said cause was tried, upon plaintiff's motion for an extension of time to file his bill of exceptions herein, and also upon plaintiff's motion for a new trial, Richard H. Johnson, Esq., appearing

as attorney for plaintiff and Messrs. Richards & Haga appearing as attorneys for defendant, and the Court having heard the arguments of counsel and being fully advised on the premises does hereby order and adjudge:

1. That plaintiff's motion for a new trial be and the same is hereby overruled.

2. That plaintiff's time for filing and serving his proposed bill of exceptions to the rulings, findings and decision of the Court at the trial be and the same is hereby extended to and until the eighth day of July, 1920.

(Signed) FRANK S. DIETRICH,
District Judge.

Done in open Court this 17th day of June, 1920.

Plaintiff's proposed bill of exceptions was duly filed and served within the time allowed by this order, to-wit, on July 2, 1920, and thereafter, on July 12, 1920, counsel for defendant served and filed a motion to strike, which is as follows:

(Title of Court and Cause.)

MOTION TO STRIKE

COMES NOW, The above named defendant, and moves the Court to strike from the files herein the proposed bill of exceptions of plaintiff filed herein on the following grounds:

(1) That such bill was not filed or served on counsel for defendant herein within the time required by law or the rules of this Court.

(2) That this Court had no power or jurisdiction to extend the time for filing such bill after the

time required by law and the rules of this Court for filing such bill had expired.

And this defendant also moves the Court to strike from such proposed bill of exceptions all that portion thereof from and after the word "complaint" in line 7 from the top of page 1 of such bill, after the caption, to and including the words "the Court" in line 17 from the top of page 9 of such bill, on the following grounds:

(1) That such portion of such bill was not filed or served on counsel for defendant within the time required by law or the rules of this Court for filing such bill, or any bill embracing the exceptions therein set forth.

(2) That this Court had no power or jurisdiction to extend the time for filing such proposed bill after the time required by law and the rules of this Court for filing a bill of exceptions to the ruling therein mentioned had expired.

And this defendant also moves the Court to strike from such proposed bill of exceptions all that portion of such bill included between line 15 from the bottom of page 9 of such bill and the bottom of page 47 of such bill, on the following grounds:

(1) That such portion of such bill was not filed or served on counsel for defendant within the time required by law and the rules of this Court for filing such portion of such bill.

(2) That this Court had no power or jurisdiction to extend the time for filing such bill after the

time required by law and the rules of this Court for filing such bill had expired.

(3) That the record herein fails to show that any special findings or any request for special findings were made or that any findings herein, other than a general finding, were made, and in such cases the said plaintiff is not permitted under the law to present the question of the insufficiency of the evidence to support the judgment rendered herein.

And the defendant also moves the Court to strike from such proposed bill of exceptions that portion thereof beginning with page 48 to and including the fifth line from the top of page 51 of such bill on the following grounds:

(1) That no request was made by either party to this cause for special findings or any findings and no special findings were made by the Court, and the statements in the proposed bill of exceptions to the effect that counsel for plaintiff requested the Court to find certain facts are not supported by the record.

(2) That such portion of such bill was not filed or served on counsel for defendant within the time required by law and the rules of this Court.

(3) That the Court had no power or jurisdiction to extend the time for filing such proposed bill of exceptions after the time required by law and the rules of this Court had expired.

(4) That the opinion of this Court herein cannot be regarded or considered as a special finding within the meaning of the Federal Statutes, or the rules of practice of this Court.

(5) That the record herein fails to show any special findings were requested or made prior to final judgment herein and the opinion or decision of this Court herein cannot be referred to or regarded as a special finding or as embracing a special finding.

(Signed) RICHARDS & HAGA,
Attorneys for Defendant.
Residence: Boise, Idaho.

This motion came on for hearing on July 14, 1920, and was argued by counsel.

Thereafter, on July 15, 1920, the Court sustained said motion to the extent of striking the portion of the bill of exceptions relating to the motion to remand, on the ground that a bill of exceptions was not prepared and served within the ten days allowed by the rules after the order denying the motion was made, or during the term of Court at which the order denying the motion to remand was made; to which ruling counsel for plaintiff excepted, which exception is allowed by the Court. The affidavits and papers relating to the motion to remand as set forth in the foregoing bill of exceptions, were all of the affidavits and evidence before the Court on said motion to remand.

Rules 76 of this Court relating to bills of exceptions reads as follows:

> "A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such

time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the clerk.

"If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without a jury within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions. The exception must be accompanied with a concise statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tended to prejudice the rights of such party. Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill. Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge. The Clerk must, as soon as practicable thereafter, deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill; and

the Clerk must, as soon as practicable thereafter notify or inform both parties of the time so designated by the Judge. In settling the bill the Judge must see that it conforms to the truth, and that it is in proper form, notwithstanding that it may have been agreed to by the parties, or that no amendments may have been proposed to it, and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter. After the bill is settled, it must be engrossed by the party who proposed the bill, and the Judge must thereupon attach his certificate that the bill is a true bill of exceptions; and said bill must thereupon be filed with the Clerk."

The Court, at the hearing for the settlement of this bill of exceptions, also suggested certain amendments, which were accepted by counsel for both sides and are duly incorporated in this bill of exceptions.

The Court overuled the remaining grounds of defendant's motion to strike, to which ruling defendant is allowed an exception.

NOW THEREFORE, It appearing to the Court that the foregoing bill of exceptions has been amended as directed by the Court and that the same is true and correct, it is hereby approved, allowed and settled and made a part of the record herein, this 16th day of July, 1920, a day of the regular term at which said cause was tried.

(Signed) FRANK S. DIETRICH,
Lodged July 2, 1920. *Judge.*
Endorsed: Filed July 16, 1920.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR

And now comes J. A. Czizek the plaintiff herein by Richard H. Johnson, his attorney, and feeling himself aggrieved by the final judgment of this Court entered against him and in favor of said defendant, on the 8th day of May, 1920, hereby prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals of the Ninth Circuit, to the District Court of the United States for the District of Idaho, Souhern Division, and in connection with this petition, petitioner herewith presents his assignment of errors and prays that a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated Boise, Idaho, July, 29, 1920.

RICHARD H. JOHNSON,
Attorney for Plaintiff.

The writ of error as prayed for in the foregoing petition is hereby granted and allowed upon the plaintiff's giving bond according to law in the sum of $200.00, and upon the filing of such bond, it is ordered that a transcript of the records, proceedings, evidence, affidavits, orders and papers, upon which the judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that such other and

further proceedings may be had as may seem proper in the premises.

Dated July 29, 1920.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed July 29, 1920.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

And now comes the plaintiff in error, J. A. Czizek, by Richard H. Johnson, his attorney, and in connection with his petition for writ of error says, that in the record, proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice to the plaintiff in error, to-wit:

1. The Court erred in denying the motion of the plaintiff in error to remand said cause to the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada and in entering its order dated the 10th day of October, 1919, denying said motion to remand and in denying the application of plaintiff in error to make a further showing as to his residence and citizenship at the time said action was commenced and since that time.

2. The Court erred in sustaining defendant's objection to the testimony of plaintiff that if he had received the telegram he would have accepted the offer contained in the message.

3. The Court erred in holding that the testimony relating to the statements and communications of

Mr. Hackett, manager, to T. J. Jones and to plaintiff, and the letter from Mr. Life, district superintendent, did not constitute a waiver by defendant of the clause on the telegraph blank which provides for the filing of a claim in writing within 60 days after the telegram is filed with the company for transmission.

4. The Court erred in holding that the evidence was insufficient to show that plaintiff could have gotten his stock which was held in a bank at Oakland as collateral, to Boise in time to have accepted the offer made by Miller, even if the telegram had been sent and delivered.

5. The Court erred in overruling plaintiff's objection to the admissibility of the rules and regulations contained on the telegraph blank and filed with the Interstate Commerce Commission on the ground that these rules and regulations were not binding upon plaintiff, the addressee of the message.

6. The Court erred in overruling plaintiff's objection that the provisions on the telegraph blank relating to repeated and valued telegrams were not binding upon plaintiff, the addressee of the message.

7. The Court erred in holding and deciding, under the testimony showing that the telegraphic message had never been transmitted from the Boise office at all, and no excuse or explanation of such failure having been made at all by defendant, and the further fact that a few days after the message was filed for transmission in the Boise office, the defendant informed the sender that the message had

been sent and delivered to plaintiff in Oakland, that these facts did not constitute gross negligence, which would except the case from the conditions on the telegraph blank limiting the defendant's liability.

8. The Court erred in holding and deciding that there was nothing unusual on the face of the telegram to impress the defendant and its servants and employees with the fact that it was of special importance.

9. The Court erred in holding that in sending the message the sender was acting as agent of the plaintiff.

10. The Court erred in holding that the evidence was insufficient to support a finding that plaintiff was damaged by the defendant's failure to transmit and deliver the telegram, and that plaintiff would have embraced the opportunity to sell his stock and could and would have delivered it while Miller was able and willing to make his offer good.

11. The Court erred in finding in favor of defendant and entering judgment in favor of defendant and against plaintiff.

12. The Court erred in not entering judgment in favor of plaintiff against defendant for the amount prayed for in plaintiff's complaint.

13. The Court erred in sustaining defendant's motion to strike from the bill of exceptions that portion thereof relating to the motion to remand the case to the State Court.

BY REASON WHEREOF, plaintiff in error prays that the judgment may be reversed.

RICHARD H. JOHNSON,
Attorney for Plaintiff in Error.

Endorsed: Filed July 29, 1920.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 692

BOND

KNOW ALL MEN BY THESE PRESENTS That we, J. A. Czizek, plaintiff in error, as principal, and G. R. Hitt and J. H. Black of Boise, Ada County, Idaho, as sureties, are held and firmly bound unto the above named Western Union Telegraph Company, defendant in error, in the sum of Two Hundred Dollars ($200.00) to be paid to it, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our hands and dated this 29th day of July, 1920.

WHEREAS the above named plaintiff in error has prosecuted his writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and judgment of the District Court of the United States for the District of Idaho, Southern Division, made and entered on the 8th day of May, 1920;

NOW THEREFORE, the condition of this obliga-

tion is such that if the above named plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs, if he fails to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(Signed) J. A. CZIZEK. (SEAL)

By Richard H. Johnson, his attorney and agent.

(Signed) G. R. HITT. (SEAL)

(Signed) J. H. BLACK. (SEAL)

State of Idaho,

County of Ada,—ss.

G. R. Hitt and J. H. Black, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Idaho and residents and freeholders in the said County of Ada, and know the contents of the foregoing instrument to which we have attached our names. We, each for himself, say we are worth the sum of Two Hundred Dollars ($200.00) over and above all debts, liabilities and exemptions.

(Signed) G. R. HITT.

(Signed) J. H. BLACK.

Subscribed and sworn to before me this 29th day of July, 1920.

(Signed) H. L. STREETER,

(Seal) Notary Public, Residence, Boise, Idaho.

Bond Approved.

FRANK S. DIETRICH, *Judge.*

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

WRIT OF ERROR

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States of the Ninth Judicial Circuit in and for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said District Court, before you between J. A. Czizek, plaintiff, and Western Union Telegraph Company, defendant, a manifest error hath happened to the great damage of the said plaintiff J. A. Czizek, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California on the 27th day of August next, in the said United States Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Edward D. White, Chief

Justice of the United States, this 29th day of July, in the year of our Lord one thousand nine hundred and twenty, and of the independence of the United States the one hundred and forty-fifth.

(Seal) W. D. McREYNOLDS,

Clerk of the District Court of the Ninth Judicial Circuit, in and for the District of Idaho, Southern Division.

The above writ of error is hereby allowed.

FRANK S. DIETRICH,

Judge.

I hereby certify that a copy of the within writ of error was, on the 29th day of July, 1920, lodged in the Clerk's office of the said United States District Court for the District of Idaho, Southern Division, for the said defendant in error.

W. D. McREYNOLDS,

Clerk of the United States District Court, District of Idaho, Southern Division.

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

CITATION

(Title of Court and Cause.)

United States of America,—ss.

To Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California on the 27th day of August, A. D. 1920, pursuant to writ of error on file

in the Clerk's office of the District Court of the United States of the Ninth Judicial Circuit, in and for the Southern Division of the District of Idaho, in that certain action No. 692 wherein J. A. Czizek is plaintiff in error and you, said Western Union Telegraph Company are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said J. A. Czizek in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the Southern Division of the District of Idaho, Ninth Judicial Circuit, this 29th day of July, 1920, and of the Independence of the United States, the 145th.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho.

Service of the foregoing citation is hereby acknowledged this 29th day of July, 1920.

Endorsed: Filed July 29, 1920.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 692

PRAECIPE

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States

Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. Complaint.
2. Answer.
3. Decision of Court.
4. Judgment and notice of entry of judgment.
5. Bill of exceptions.
6. Petition for writ of error and order allowing writ.
7. Assignment of errors.
8. Bond in writ of error.
9. Writ of error.
10. Citation.
11. Praecipe.
12. Return of Record.
13. Clerk's certificate.

Dated July 29th, 1920.

RICHARD H. JOHNSON,
Attorney for Plaintiff in Error.

Service of above praecipe acknowledged this 29th day of July, 1920.

RICHARDS & HAGA.

Endorsed: Filed July 29, 1920.
W. D. McReynolds, Clerk.

RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United

States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D McREYNOLDS,

(Seal) *Clerk.*

(Title of Court and Cause.)

No. 692

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 133 inclusive, to be full true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $154.85, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court, this 21st day of August 1920.

W. D McREYNOLDS,

(Seal) *Clerk.*